

EDINBURGH, The Fifteenth Day of September 1699.

Council, That none shall Re-print, or Import into this Kingdom the Book Entitul'd, The Decisions of the Lords of Council and Session, in sundry important Cases before them, from July 1661, to July 1666. Observed by Sir John Gilmour of Craigmillar, at that time President of the Colledge of Justice. And also, The Decisions of the Lords of Council and Session, from November 1681, to January 1686. Collected by Sir David Falconer of Newtoun, President of the Colledge of Justice. For the space of Nineteen Years after the Date hereof, without the Consent of John Vallange Bookseller, under the pain of Consiscation of the whole Copies; Also the Sum of a Hundred Merks Scots.

Extracted by me GILB. ELIO T. Cls. Sti. Concilii,

COLLECTION DECISIONS LO R D S Council and Session.

IN TWO PARTS.

The First contains Decisions from July 1661, to July 1666. Obferv'd by Sir JOHN GILMOUR of Craigmiller, President of the Colledge of Justice.

The Second Part contains Decisions from November 1681, to January 1686. Observed by Sir DAVID FALCONER of Newton, President of the Colledge of Justice.

Never before Publish'd.

Revised and Corrected, according to the most Authentick Manuscript Copies, and Augmented with a Table of the Names of the Pursuer and Defender; and with a Table of the Matter, containing not only the Determination of the Lords in the Cause, but also the Positions of Law made use of in the Pleading, which may serve for an Alphabetical Compend.

As likeways the Acts of Sederunt from 1681.to 1691.and continued to 1696. with an Indice of the same Acts.

EDINBURGH.

Printed by fames Watson, for fohn Vallange Book-seller, and are to be Sold at his Shop on the North-side of the Street, alittle above the Cross. M. D CCI.





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TO

Sir James Stewart

GOOD-TREES, Knight.

His MAJESTY's Advocat,

One of the Officers of STAT E, for the Kingdom of SCOTLAND,

One of His MAJESTY's most Honourable PRIVY COUNCIL, and EXCHE-QUER.

And one of the Lords Commissioners of the ADMI-RALITY.

The Publisher humbly Dedicats this Collection.

Sir James Btowart

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His MAJESTY's Advocat,

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READER.

HE Duty which the Publisher conceives to be Incumbent on every Member of a Society, To contribute what in them lyes, towards promoting the Publick Good, is one of the Motives of this Collection's getting into Print: For being careful to gather what might advance his Knowledge of the Laws, he fell upon these Decisions, whereof there be very sew Copies abroad; and finding them to be singular, and exactly observed, he thought his Vacation Hours cou'd not be better employed than in comparing the different Copies, and sitting one for the press; And the Truth is, That till this Publication, there's not an exact Copy extant. He owns himself oblig'd to the Representatives of the worthy Authors, and he thanks them for Communicating to him the Copies which they had beside them, but even these wanted Correction, and he hopes, that excepting the Errors of the press, which are not many, the Reader will find stull Satisfaction in this Edition.

The small number of our Law Books, and the greatest part of them being Manuscript and unprinted, is one of the Hindrances to the easie attaining a sull knowledge of that Divine Profession; So that the Publisher expects, this Collection will on that account be acceptable. The Decisions moreover being recommendable, not only for the Cases determin'd, but also for the Observers, who being Men eminent in the Bench, have notic'd them with all exact Succinctness. The Publisher needs not give the Characters of his Authors, surther than telling, that both were Esteem'd for their Knowledge in the Laws of their Countrey, and for their Loyalty to their Prince; And that Sir John Guilmar had obtain'd the Character of The Honest President, and that Sir David Falconer was reckoned One of the most painful Lavvers in his time. For that Loth.

both were Men of singular Merit may be judg'd from this, That the Office of President of the Colledge of Justice is such, as none but a great Lawer can discharge.

The Publisher might for this Publication, also alledge the Reasons common to almost every Author, but he only professes, That purpoling to qualify himself for serving his King and Countrey, and being at present but a learner of the Laws, he thought sit to Copy after the Writings of the most learned Masters; And he thought that the design of making these Decisions publick, would not only out of respect to the Authors, but for his own Reputation, oblige him to a more near Consideration of the Subject, and of the manner of Treating it, which he owns to have done, and tho' no other person were to be benefited by this Labour, he must acknowledge himself sufficiently rewarded for his pains, for the ordinary way of reading of a Book, which is done with some fort of Coldness, does not carry along with it half the Consideration a Publisher must be at, especially when he's about composing his Table of the Matter; And he recommends to the Industrious Student of the Law, to make for his own use a New Indice of all the chosen Authors he reads, without respect to the Tables made to his Hand, as a most effectual Mean of speedily attaining his end.

Towards the promoting the Knowledge of the Lawes, it were to be wish'd, that some Methods were laid down for an exact Collection of the Decisions of the Lords of Session, and for an early Publication of them; And that His Majesty and the Ministers of State would encourage a Design propos'd, and which is under the Consideration of the Honourable Faculty of Advocats, whereby it is intended, That the Decisions of the Winter Sessions shall be made publick at the beginning of the Summer sollowing, and the Decisions of the Summer shall be published in the ensuing Winter, which cannot chuse but be Universally Useful, see it is propos'd, that the Decision shall be agreeable to the Record, and the Interlocutor writen in the words of the Decreet.

It were likewise to be desir'd, That the Students of the Laws would apply themselves to a more A Tiduous Study of the Law of their own Country,

for when one confiders the Number of Books our Predeceffors have wish their own Hands Copyed, and the great pains they were at to attain the Knowledge of the Laws, Civil, Fendal, Canon, and Municipal, beside the full Knowledge of History, Politicks, Philology, and Classical Learning. It must be own'd, That the Young Men of this Age, in point of Painfulness, come far thort of their Ancestors: It is true, That the Encouragement which the professors of the Law then had, and the Respect pay'd them, was greater than it is at present; Places and Preferments were bestowed according to Merit, every Man had an Employment according to his Skill; The Candidats of the Law were Clerks and Servants to the Experiene'd Advocats, and had an oppertunity of Learning at the same time, both the Civil, and the Municipal Laws, when those Advocats were either Advanc'd to the Bench, or the young Students, who by that time were fitted for Buffiness through their attendance at Gamaliel's Feet, did presently get into Employment, and a competent liveing. It might be thought a properEncouragement for this Noble Profession, To discharge the Venality of all Offices, to Punish most vigorously all Malversations through Ignorance or Deceit, and to Establish into a Law, what was sometime Enacted in the Convocations in the Reign K. Charles the 1st. Concerning the Nomination of Judges and Officers of State; for the Coin was falle, the Bullion is good, At least to confirm by Act of Parliament, a Letter K. Ja: 6th. wrote to the Lords of Session in May 1605. That none shall thereafter be received in any of which imports, the Vacant Places of the Session, except the party to be admitted be. of the Quality and Condition following, That he be one of the Antient, Wife, and Learned Advocats, who have given best proof of their Wisdom, Honesty, Learning, and Good Behaviour in the exercise of their Office of Procuration. For which Cause the Lords of Session in all time coming, shall have Enacted by their own Election, and Inrolled in their Books, the Number of Six, of the Advocats of their Court, who shall be thought most Expert, Qualified, and Worthy to supply any Place may happen to Vaick amongst them, who may be Call'd and Elected; and as any then shall Inlaick the Lords of Session shall Call and Elect another of the same Quality in his place, and so hold the Number ever full of Six, the most sufficient Advocats to be preferred by "His Majesty's Nomination, to any place that may Vaik in the Session. &c. And

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Thefe are, thewords . of His Letter.

And further, for avoiding the General Abufe, when the place of Justice, and of Administration is obtain'd by Corruption, or filthie Moven in such Cases of Buying and Selling. His Majesty's Will was, That it be Enacted, that none be admitted or received in time coming, Majesty's' but that they be first straitly Sworn; That they neither directly, nor indidrectly have obtain'd their Presentation, nor procur'd any other to dimit, to the effect they might be presented, by any Sinister

Moven, by Gold or Silver, or for any Good Deed or Promise thereof: And if the contrary be found, That they shall be Deprived and Pu-

' nished as perjur'd and infamous Persons.

Sundry things might be faid on this Subject, but because they might be thought a Digression, they're laid aside.

To make this Collection the more Useful, the Acts of Sederunt of the Lords of Session, from the Year 1681. to 1696. are adjoyn'd. Since which time none have been made.

The favourable Reception of this, will Eucourage a Publication of other Law-Tracts, which in the Opinion of the Judicious, will very much Contribute to the Publick Good. In the mean time make good use of what's publish'd,

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LORDS

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Council & Session,

In fundry Importent Cases, plead before them, from Fuly 1661, to Fuly 1666. Observed by Sir FOHN GILMOUR of Craigmillar, at that time President of the Colledge of Justice.

EDINBURGH,

Printed by James Watson, for John Vallange, and are to be Sold at his Shop on the North-side of the Street, alittle above the Cross, M. D. CCI.

My Lord Direlon Objector from Doc. 1. 1665 to Jan. 9. 1666.

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DECISIONS

OFTHE

Lozds of Council and Sellion,

From July 1661. to July 1666.

I. The Laird of Niddrie against Boyd. July 1661. By analeller of flain

HE Laird of Niddrie having given a Bond of 7000 Merks to am-Edmonstoun of Wolmett, which truely was given guhile for James Raith of Edmonstoun, for Satisfaction and Assythment of the Mutilation of Wolmett's Hand, which Edmonstown had cut off: And this Bond, with a Letter of Slains, being configned in the Marquis of Argyle's Hand, they were both lost; whereupon the Tenor of the Bond was made-up and proven. This Bond was affigned by this Wolmett to John Boyd Merchant: And Niddrie having raised a Multiple-pointing against Wolmett, John Boyd, and Jean Douglass Reliet of old Wolmett, and David Cuninghame now her Husband. It was alledged in the Reason of Suspension, That the Money could not be payed, because there was no Letter of Slains granted to Edmonstoun by this Wolmett, and by the Relict and the rest of the Children, but only by this Wolmett as Heir. It was answered, That the Letter of Slains by the Heir was sufficient, in a matter of Mutilation, seing the Relict had no loss thereby, nor the rest of the Children; especially seing it was nottour, that a Letter of Slains was granted by the Defunct, configned and left, and that the Bond was Heretably granted and made to the Defunct, to whom this Wolmett is Heir, and so only pertaining to him as Heir.

The Lords Repelled the Reason of Suspension, in respect of the Answer.

In præsentia.

It was alledged by the Relict and her Husband, That they ought to be preferred to the Assigney; because the Mother being Tutrix to her Son, the had a Process depending against him for Tutor-compts, wherein divers Articles are found Relevant more than to exhauft that Sum: And upon the faid Process an Arrestment was used, before the Assignation made to John Boyd. It was answered, 1mo. That the Arrestment being upon a Dependance only, is loofed. 2 do. The Affignation is for an Onerous Cause; whereupon the Affigney having Charged, and the Suspension being now ready to be discust, is preferable to an Arrester, whereupon nothing can follow so long as the principal Cause is undetermined; and though there may be fundry Articles past, non constat what the event of this Process may be; and fo the Assignation being made to a Creditor, who, if he had not gotten the Assignation, would have Arrested, and pursued to make the Sums forthcoming; The Assigney can be in no worse case, then if he had Arrested at the same time when he got the Assignation: In which case, he would have been preferred, notwithstanding of a priorArrestment upon the Dependance.

The Lords preferred the Assigney.

In præsentia.

ministers Stipend.

II. Mr. Robert Herries against Lockerbie, 4. July 1661.

R. Robert Herries Minister at Drysdail, having Anno 1641. set to who Suspends upon this Reason, That the Town of Glasgow, having gotten from the King, a Right to the Spirituality of Glasgow, they obtained a Decreet of Reduction of this Tack, the Minister being called; And the Reafon of Reduction was, In respect Drysdail was not a Personadge, but a Menfal Kirk of Glasgow; and the Minister had never more from the Bishop, but an Affignation to fo much of the Teind as he was pleafed to give him. It was answered, That the Reduction was not obtained till the Year 1656. And the Minister being in Possession 15 or 16 Years before, though the Tack be reduced; yet his Possession, without respect to the Tack being so long, it ought to give him as Minister, a good Right to the Stipend he enjoys, being no more, but rather less, then the Law allows to Ministers. Likeas, Lockerbie got a new Tack from the Town of Glasgow, which reserves. what is Allocate to the Minister; and there being no other Allocation than has been allowed to him by his Possession, he ought to continue therein; especially, seing the Teinds are able to pay both the Tack-duty pay-

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achions.

Of Council and Session, 1661.

able to the Town of Glasgow, and the Quantity also contained in the Charge. Likeas, he passeth from the Charge, in so far as it is sounded upon the Tack, and insists only as Minister serving the Cure.

The Lords sustained the Charge for the Quantity, whereof the Minister has been so long in Possession; the Ministers Stipend being no greater than what is allowed by Law.

III. Jean and Marion Mitchells, against Hutchisons, July 1661. duction of

Utchisons having obtained Sentence against Mitchels as Heirs of their within Father, and their Tutors and Curators; they intented an Action before their Age of 21. Years, of Restitution in integrum, and Reduction of the Service and Retour ex capite minoris ætatis & læsionis. Against the which, It was Alledged, That all Parties having Interest were not called, Viz. The Pursuers in the Decreet. Hutchisons, who were a necessar Party, having obtained their Decreet against Mitchels as Heirs, and which Decreet would fall per Consequentiam, and they not being acted pro interesse, before the Pursuers Age of 25 Years: There is now no Locus for Restitution to their To which, It was Answered, That Mitchels being only Principaliter, to reduce a Service and Retour, they needed not to call any but the Judge, Clerk, and Inquest, which they did Debito tempore; And they were content that Hutchisons should compear for their Interests, to propone any thing against the Restitution, as if they had been Cited. Likeas, their Decreet was not known to the Mitchels, being recovered against them when they were but 12 Years of Age, which never came to their knowledge, or if ever it did, they 'ad forgotten it after so long a time. q"adofopes in ave

The Lords Repelled the Alledgance.

In this Process there having been an Interlocutor of the English Judges, finding that a Defence proponed by the Hutchisons, viz. That the Pursuers had Disponed, or Excambed Lands pertaining to their Father to whom they were Heirs, did exoner the Pursuers ab onere probandi minorem ætatem & læsionem.

The Lords found this Unjust, and that the Pursuers should prove the Reason of Reduction; because the Desences and Reasons are Consistent, and the Desender might lawfully propone the Desence, deny-

ing the Reason.

William

on is coincideal, to the reason of reduction to

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h intermeted IV. William Ker, against Mr. Robert Steidman Minister at Carridden.

N this Process it was found, That a Stipend of a Suspended Minister did not vaque, the Suspension being only interprete to be ab officio, non bene-As also found, That an Act of the Presbitry, Subscribed by the whole Presbitry, Presbitry, bearing, That William Ker's Father, then Minister at Carridden, did Consent thereto, could not prove his Consent, unless he had Subscribed the same.

Lady Lambertoun, against the Earl of Leven, July 1661.

morroan. an assignar's bydeing by. Ne Kennedy, in an Action of Improbation, being pursued by the now y deshoby Earl of Leven, as Assigney constitute by his Father; He did Exhibite certain Bonds, alledged granted by the Deceast Laird of Lambertoun to the deceast Counters of Leven, pertaining to her umquhile Husband jure mariti: And the samen Bonds being undertaken to be Improven by Lambertoun's Son and Relick; They urged, that the Earl of Leven might declare,

22 July 1662. the Bonds were found false, and Kennedy remitted to the Justice Court.

whether he would bide-by the fame, or not? who Answered, That he would bide-by the samen qualificate, in respect he was only Assigney; and that the Bonds were never in his own Hands, nor in his Father's, but were produced by Kennedy for fatisfying the prot

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duction: And that therefore Kennedy having abidden-by the Bonds as true; and he knowing nothing of the Falshood therein, he might bide-by them add

till they were found False.

The Lords ordained the Earl to produce his Declaration, with such Qualifications as he should think fitting, which the Lords would take to consideration, how far it would be allowed or not. In præsentia.

the English of the state of the fore the English Officers at Leith, in the beginning of the Year 1652. for a Sum of Money; whereupon Jack being incarcerat, he was forced to give a Bond to this Defender, who was Affigney constitute by this Fiddes, and to give his Brother Cautioner therein. Upon which new Bond Jack was also charged, and an Act of Warding followed thereupon; the Bond being

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being registrat in the Town-court-books of Edinburgh. Jack gave in a Bill to the Parliament, which was Remitted to the Session, desiring Repetition of the Sum. It was alledged, There could be no andictio indebiti, where there was Obligatio naturalis or civilis preceeding: Ita eft, there was not only a Civil Obligation by the Sentence recovered, but by the new Bond granted to the Affigney, who was not obliged to know, how, or what way the Sentence was obtain'd: And Jack having transacted therefore, he could not now be heard to quarrel the Transaction against the Assigney, or to crave Repetition. It was answered, That the Officers Sentence was most unjust, both in the Matter and in the Manner, they having no Civil Jurisdiction: And the same Defender was affistant to the Cedent in recovering of the Sentence, as he will not deny. Likeas, the Pursuer was forced to grant the new Bond to him as Assigney, and pay the new Bond to free himself of Prison; there being no Civil Judicatory, where he could have any Remedy: The English Judges for administration of Justice not being then established, who sat not till June 1652. And though it had been fitting, it could not have been expected that Fack could have helped himfelf, by any course they would have taken, for annulling the Sentence of the English Officers. Likeas, by an Act of the late Parliament, all Sentences pronounced by the Englishes, fince their In-coming, are appointed to be reviewed.

The Lords Repelled the Alledgance, and sustained Repetition.

In prasentia.

VII. Fleming against Flemings, July 1661. The for a sum po by an oroculor of the formation of the second of the se

Alcolm Fleming Merchant in Edinburgh dyes, leaving behind him a Wise named Fleming, and many Children: She obtains her self confirmed Executrix Dative to her Husband, and Tutrix Dative to her Children; and thereaster she Marries Sir John Gibson Clerk of Session: Betwixt whom and the Children, there being a Compt and Reckoning depending before the English Judges for the time, for the Bairns part of the Desunct's Moveables. There was a Querie given in by Mr. John Harper Auditor, concerning a Cancelled Bond of 180. Pound Sterline, to Patrick Scot of Langshaw by the Desunct; which Bond the Relict alledged, she payed after the Husband's decease, and retired the Bond cancelled, with a Discharge thereof subscribed by the said Patrick. The Matter being heard before the English Judges; They ordained, before Answer to the Dispute, Patrick's Oath to be taken

taken ex officio, Whether he was truely payed of the Money by the Relict. or not? Who did depone affirmative, that she did pay the Money after her Husband's decease. The Matter being debeat in præsentia; It was alledged, 1. That Patrick Scot's Discharge could not make up a Cancelled Bond, which is no Bond, being of it self no binding Write. 2. Nor could Patrick's Oath make it up; for then it were in the power of the Relict or any other, after the Defunct's decease, to medle with retired cancelled Bonds, and to deal with the Creditors to grant Discharges, after the Debitor's Death, thereby to exhaust the Defunct's Fortune. 3. The Defunct being a Shop-keeper with his Wife, she must be presumed to have had her Husband's Money in Cash, wherewith she payed the said Bond. 4. If she payed it out of her own Money, she has done it not to burden her Children, feing she cancelled the Bond; especially seing, the time of the alledged payment she was neither Executrix nor Tutrix; and so not that Party against whom there was any Legal Title or Sentence to make Debitor, or to compel her to pay for the time. And if the Children had been confirmed Executors, and that there had been other Tutors given to them, the Cancelled Bond could not be any Ground of Action against them: And if it were otherways, great Fraud and Inconveniencies could not be obviated. Likeas, in her first Compt given in to her Children, this was not inferted as an Article of Discharge, but added after she Married her Husband. It was answered, That the Bond was a true Debt restand by the Defunct at his Death, as is evident by Patrick Scot's Discharge, and his Oath, being a famous Person, and the Bond was seen by the Defuncts Friends with the rest of his Writs, uncancelled, immediatly after his Death: And that the Defuncts whole lying Money, was not many days before, lent out to the Earl of Southesk; and for to make the Sum greater, the Defunct borrowed this Sum to be payed on Demand, which the Relict did pay shortly after her Husbands decease, having respect to her Husbands Credit; That non præsumitur donare to her Children, when she is now pursued as Debitor: And having bona fide payed it, the same should be allowed; and alledged a Practique extracted out of Durie anno 1636.

The Lords having at great length in præsentia heard the Debate, and having considered the same, with the whole Circumstances and Merits of this Article; they resused to allow the same. It is to be Remembered, That they had no regard to the Payment, whether it was by the Relict or not, but to the Cancelling the Bond; and that she was then neither Executrix nor Tutrix. And especially, they had respect to the great Inconveniencies which would follow, if they should sustain

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Of Council and Session, 1661.

the like; nor had they regard to the Practique: And indeed, it met with this Case in many things.

with this Cale in many things.

14. November, 1661. Spekold adopan to not imputable to the same Process, there being a Bond granted by the Lord Cardrofs,

by which he acknowledged himself to have borrowed from the Relict for her felf, and in Name of Andrew and Malcome Flemings her Sons, 6000 Merks, which he obliges himself to repay to her in Liferent, and after her Decease. to her two Sons in Fie; and failzieing of her Sons, to belong to her felf and her Heirs with Annualrent, als well not Infeft, as Infeft, butt prejudice to her. and after her Decease, to her two Sons to Charge for the Money without Requisition. It was alledged for the Relict, That this last Clause gave her Liberty to call for the Money, and dispose thereupon as she pleases; and accordingly she has power to loose the Fie: And two Practiques were alledged out of Durie therefore, Annis 1625. and 1626. It was answered, That the Money was borrowed from the Mother herfelf, and in Name of her Children: That Cardros's Obligement did constitute a Liferent allenarly in favours of the Mother, and the Fie in favours of the Children, and not after the manner of the Substitution, which was in the Practique alledged, whereby the Money was payable Simpliciter to the Father at a Term, and in case of his Decease, to his Son: And the Substitution or Tailie in this Bond. was only in favours of the Mother, in case both the Children should Die, having only a Liferent constitute to her self if any of them should live: That the last Clause was but stilus curiæ to exclude the necessity of the Requisition; and that the Liferenter should have Liberty to call for the Money, if the Debitor be irresponsal, and which power de jure, a Liserenter, in such a Case, has, whether it had been referved or not.

> The Lords found the Relict to be only Liferenter; and if she called for the Money, she behoved to Re-employ the famen conform

to the Bond.

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quomedo & quando debitor Item, In this Case it was alledged by the Relict, That the Bond, in so far as concerns the deceast Malcom's part, must be accepted in Contentation of Malcom's Portion Natural pro tanto; feing she being Tutrix, and having impolyed the same in his Name, non prasumitur donare: And though she be Liferenter, and Substitute after both her Sons Deceases, she is content to renounce the Liferent and quite the Substitution. It was answered, That nemo prasumitur donare; when the Money is imployed according to the Nature

of the Debt awand, which was a Moveable Debt, a Portion Natural, not affected with a Liferent or Substitution: And therefore, this being of a far different Nature, the Bond must stand as being intended ab initio, to be Debt awand by and attour the Portion Natural.

The Lords found the alledgance relevant, notwithstanding of the

Reply; the Relict quiting the Liferent and Substitution.

This ad delber and VIII. Tailziefer against Forrester, 19. and 20. November.

Atrick Tailziefer appearand Heir to his Brother Alexander Tailziefer of Red-house, pursues his Relict and her second Husband, for Exhibition of all Writes made to her Husband, and by her Husband to any Perfon or Persons, to the effect he may Advise, whether he will be Heir or not. It was alledged, That the Desender was not obliged to exhibite Writes made by the Defunct; seing they pertained not to the Defunct: And as he could not pursue Exhibition of them, so his apparant Heir cannot, and nemo tenetur edere Instrumenta to his Adversary; and if that were sustained, no Man would fecure his Charter Chift, but might be forced to discover his Weakness and Secrets at pleasure, and many other inconveniencies might follow. It was answered, That the hazard of an Heir being so great in Scotland, not having beneficium inventarii, it was Reasonable that ad deliberandum, the appearand Heir should see not only what belonged to the Defunct, but what Deeds the Defunct had done, else he should never know, whether the Heretage were profitable or not; especially considering, how Wives, Children, or Servants, having power with 5the Defunct, might Clandestinly obtain Rights, and keep them closs till the appearand Heir were Served, by which he might be destroyed.

The Lords having feriously considered the Matter, they sustained the Exhibition for all Writs made by the Desunct to his Wife, or any being in Family the time of his Decease, whereupon no Insestment followed before his Death; but not for any whereupon Insestment followed: For they thought that the Insestment being Registrat, it was sufficient

to give Information to the appearand Heir.

In præsentia.

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IX. Earl of Rothes against the Tutors of Balcleugh. 7. December. 1661.

The Earl of Rothes as Donator to the Waird, and Marriage of the Countess of Balcleugh, with Concourse of the King's Advocat: And the Countess

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Countels also pursues her Tutors-Testamentars, for Exhibition & Delivery of her Charter Chist, & all Writs & Bonds &c. It was alledged I hat there could be no Process sustained at the Countess her Instance; because her Tutors were purfued, and she could not be authorized by the Donator against them: And that as no Process could be sustained against the Countess, except her Tutors were Called. 2do. No Process at the Donators instance, because he had no interest to call for Exhibition of the Pupils whole Evidents; far less for Delivery. But when he, as Donator, should pursue for Mails and Duties, or for Removing, then he would get his Intent; unless it were alledged and proven, That the Lands whereof the Mails and Duties were craved, held otherways. To which, It was answered, That the Countess her Marriage, was under the Donators Waird; and the Law presumes her whole Estate to hold Waird, unless it were otherways shown; and that she might very well be pursuer with Concourse of the Donator, against her own Tutors, she being under his Waird, and he being in effect her To the second, It was answered, ut supra, That as Donator he had good Interest to call for the Evidents, to the end he might know the Holding, and pursue for Removing, or Mails and Duties.

The Lords found no Process at the instance of the Countess: And, yet, seing she was named in the Process as Pursuer, they found no necessity she should be called; seing her Tutors were called as Havers: And they sustained the Process at the Donators instance, against the Defenders, for Exhibition; to the effect, the Donator may have Inspection of the Countess her Retour, as Heir to her Sister; and her Sisters Retour, as Heir to her Father; and their Fathers Retour, as Heir to his Father, with the Instructions of the same only: Unless the Donator would alledge, That they, or their Predecessors, were Insest in Waird-lands, not mentioned in the saids Retours: And appointed the President to go to the Place where the Charter Chist is, receive the Keyes from the Tutor, open the samen, and show the saids Evidents to the Earl of Rothes.

In præsentia.

N. Deuar against the Countess of Murray, 18. December 1661. The Roots not start the Countess of Murray, for alledged ejecting of him furth of the Lands of Barnhill, and spuilzieing of his Goods furth thereof. It was alledged, That the Pursuer being Tenent and Tacksman to the Desender, and resting to her certain considerable Duties, he gave Bond to her for payment of the

D. cxlii.

faids Duties betwixt and a Term, containing a Declaration, That if she should not be payed, it should be lawful for her, at Martinmass after the Failzie, to use and dispose upon the Room at her pleasure; and per verba de presenti, he did Renunce the Tack in case of not payment. Likeas, he having failzied, the did accordingly at Martimass set the Lands to another Tenent, which this Purfuer has in effect homologat, by accepting a Subtack of a part from the Tacksman. And as to the Goods, the intrometted with them by vertue of a Disposition thereof, granted by him to her, for fecurity of the saids by-run Duties. It was answered, There was no Declarator of the Failzie, and the could not enter brevi manu without a Sentence: And that before Mertimass the Pursuer did offer the by-run Duties to the Defenders Factor: And when he took the Sub-tack, he protested it was butt Prejudice of his Action against the Defender. It was Replyed, That the Defender needed not to have Declarator, the Pursuer having per expressum declared, That it should be lawful to the Desender, in case of not payment at Martinmass precisely, to Use and Dispone upon the Room; which, if the had not done, it behoved to have lyen Waste; he having no Goods, but such as were disponed to the Desender: That the Offer was long after the Term of payment, and did bear no real Numeration of Money, more or less; but only, that he offered the by-run Mails and Farmes: I hat there was no Confignation used upon the Offer; and that the Protestation was contraria facto, seing the Acceptation of the Sub-tack, was a clear acknowledgment of the Right in the Principal Tacksman's Person.

The Lords found the Alledgance Rele vant. 100. Q. cviii. p. 81.

Comprising.

XI. Seton against Rosewel, December 1661.

IN a Compt and Reckoning pursued at the instance of James Seton, being a Third Compriser of certain Houses in Leith, from Mr. James Gray, against Anthony Rosewel, who acquired a Right to the two first Comprisings, and was in Possession. It was alledged by the Desender, That he was only Comptable for his own, and his Authors Intromission, and not according to the Rental produced, bearing what the Lands payed at the time of his Authors entry thereto: And that by the Act of Parliament 1621. he was tied to no farther; and alledged also some Practiques, Annis 1624. and 1625. It was answered, That the Desender ought to be Comptable for Subsequent or After-Years, according to the Rental, whereby his Author medled the first Year; else, it should be lawful to a Compriser, after he has removed

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the Debitor and entred to the Possession, to list, or not list, what Duties he pleased, and consequently to ruin the Debitor; whereas, when he enters to the Debitors Lands, he ought tanquam bonus pater samilias, to make use of the comprised Lands &c. It was Replyed, That before the Year 1621. the whole Duties belonged to the Compriser for his Annualrent, had they been never so great, nor any part Compted in sortem: And this being restricted by the Act, and the Compriser having only his Annualrent, and the Superplus to be allowed in the Principal Sum: There the Law did oblige the Compriser to be Comptable for more than he meddled with: Against whom, within the time of the Legal, the Debitor may use an Order of Redemption when he will.

The Lords found the Compriser Comptable, according to the Rental payable, and payed to the Compriser the time of his Entry, butt prejudice of his lawful Defences, upon Probable Reasons; wherefore

Defalcation ought to be allowed for After-Years.

Item, In the same Cause it being alledged, That the second Compriser she superior. It was answered, That the second Comprising, being in effect, only of a Legal Reversion: It was frustra, and unnecessar to seek an Insestment from the Superior; and the Compriser cannot seek superfluous Expenses off his Debitor. It was Replyed, That a second Compriser has good Reason to seek an Insestment; because, possibly the first Insestment might be Reducable upon Grounds not known to him, at the instance of a third Compriser, as upon payment of the Debt, Informality or Falsehood: So that to secure himself, the second Compriser has good Right to seek an Insestment.

The Lords found, that the Composition should be allowed to the Second Compriser, providing the samen with the Composition payed by the first Compriser, do not both exceed a Years Rent; and if they did not, then to allow pro tanto. For they found, that all the Superior could have for Comprisings, were they never so many, was but one

Years Rent.

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XII. Steuarts against Abstracters of Multures. 3. January 1662. Airlago Imomonial comingto a -mound in region.

IN an Action for abstracted Multures pursued by James and Robert Stuarts, Tythos against the Heretors and Tenents of the Lands assricted to the Mill of Aberlemnoch. It was alledged for the Defenders, That there was no Astri-

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ction

Ation shown, and that they were Infest in their Lands cum molendinis & multuris, long before the Pursuers or their Authors their Infestments in the Mill. It was Answered, That the Mill is a Mill of the King's Property: And the Pursuer offered to prove, that he and his Authors have been in immemorial possession of the assricted Multures lybelled: So that in molendino Regio, Possession immemorial is equivalent to a legal Constitution of a Thirlage, by the Law and Practique of this Nation, whatever be the Law in other Mills.

The Lords Repelled the Alledgance.

It was also further alledged, That the Teinds should not be astricted by a single possible of the possible of

The Lords Sustained the Alledgance, and sound Teinds Free; unless they suffer Fire and Water within the Lands of the Thirlage: They found also, Horse-corn Free, for Sustentation of Horses that Labour the Ground.

In præsentia.

Aach bond anent a viget XIII. Grant against the Earl of Murray. 7. January 1662.

He deceast Earl of Murray seus a piece of Land to the Laird of Grant Anno 1653. and Grant gives a Back-bond, That if the Earl should, by Advice, think sit rather to have back the Feu, than that Grant should bruik it, he is obliged to Denude himself; the Earl always paying the Money at Whitsunday thereaster. The Earl dies before Whitsunday: And this Earl, his Son, within Five or Six Days before his Service as Heir, offers the Money to Grant, by way of Instrument, and pursues him to Denude himself. It was alledged, That the Bond was only Personal, in savours of

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the late Earl, and not of his Heirs, and is stricti juris; and that this Earl was not Heir the time of the Offer, nor did he Confign the Money. It was answered, That the Right to the Bond is Transmissible to the Heir, seing he says not, That if the Earl being on Life, should pay, &c. And so he is obliged to Denude himself, in savours of the Earl's Heirs or Assigneys. That this Earl, the time of the Offer, was appearand Heir, and within sew Days thereafter, Retoured: And the Offer was sufficient, seing the Bond provided not the Consignation of the Money, being als sure in the Earl's Hands, as any others.

The Lords Repelled the Alledgance. for Stant Dris. pt. 1. p. 77.

XIV. Barclay against the Laird of Craigivar. 8. January 1662. Passelle Ho.

Andrew Barclay pursues Craigivar, as Intromettor with his Father's Lands wherein he died Insest, for payment of a Debt owing by his Father. It was excepted, That, any Intromission that he had, was by vertue of a Comprising deduced against him for his Father's Debt, for which Decreet was obtained against him as charged to enter Heir to his Father; to which Comprising the Desender had Right. It was answered, That the Desender being appearand Heir, and having Right to the legal Reversion of the Comprising deduced against himself, the Comprising was not expired: And to acquire such a Right, and possess thereby, imports gestionem pro harede.

The Lords found the Exception Relevant, notwithstanding of the Answer; unless the Pursuer would alledge and prove, That he intrometted with more than satisfied the Comprising: And found, that he might als lawfully buy an unexpired Comprising, as a Wodset. His constitute walkers by act-xxiv Pare. 1695.

XV. Breadie against Breadie. 10. January 1662.

Ne Breadie procures the Gift of his Brother's Escheat, as an Adulterer, and pursues a Declarator. It was alledged, That he was never convict in a Criminal Court for Adultery. It was Answered, and offered to be proven, That he satisfied the Kirk as an Adulterer, and took a Remission therefore. It was Replyed, That no such Church Satisfaction or Confession could be equivalent to a Conviction by an Assyle, which only could make his Escheat to fall; unless he had been denunced Rebel, or declared Fugitive for not Compearance: Nor did the taking of a Remission import so much:

much; feing Men may take Remissions where there is no Ground for a Criminal Conviction; and unless he were pursued Criminally, and defended himself by his Remission, and thereupon were Assoilzied, the accepting of a Remission could not make him guilty, to make his Escheat fall. The Lords found the Alledgance Relevant, and Assoilzied.

XVI. Ashurst against Cuming. Subsidiary action, ag amagistrat.

Illiam Cuming Bailie of Glasgow, is pursued by Henry Ashurst Merchant in London, for fuffering Robert Gray Merchant to escape, being taken with Caption, and was presented to the Bailie by the Messenger who took him, and required, by way of Instrument, to put him in Firmance. It was answered, That the Bailie was only required at Ten a Clock in the Night, when he was going to Bed: That the Bailie commanded an Officer to wait upon the Messenger, and take the Rebel to Prison, there being other two with him; but he did by speed of Foot run away, leaving his Cloak behind him, before he went to the Prifon-house; and that now 4 the Rebel is re-taken and imprisoned, without any Prejudice to the Pursuer. It was Replied, That the Bailie's Fault or Neglect, did render him Debitor to the Pursuer: And the Rebel's Incarceration cannot liberat him there-from. The Lords, before Answer, ordained the Pursuer to condescend,

whether the Rebel be in worse Condition or not, the time of his In-

carceration. CY11.

Conforma no foods 10000 . Tocoas. XVII. Fairholme against Biset. 14. January 1662.

Serbing an Dut T Homas Fairholme, as Executor-creditor to Andrew Reid, pursues Marwing last year. I garet Bisset for certain Merchant-ware intrometted with by her, be-But not firming longing to the Defunct her Husband. It was excepted, That the intrometted as Executrix-creditrix to her Husband, the famen Goods being in her possession the time of the Confirmation; And the Pursuer having done no Diligence therefore, before her Confirmation, the ought to be preferred: Seing Confirmation and Possession compleats a Right in her Person, without farther Execution, which a naked Confirmation doth not in the Person of the Pursuer. It was answered, That the first Confirmation, in the Person & of the Executor-creditor, gives such a Right, that it excludes all second Confirmations in the Point of Law, except ad omiffa, on executa, where the principal Executor is dead. And albeit the English Judges, in whose

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time both Testaments were Consirmed, did bring in pari passu all Creditors, who did Consirm within half a Year after the Desunct's Death, and that the Pursuer's Testament was within half a Year; yet this Excipient, by her Consirmation, cannot have that benefit, far less can she be preserved; because she was not Consirmed till after the half Year was expired. It was Replied, That she was Consirmed within Nine Days after the half Year, and her Edict was served within the half Year.

The Lords Preferred the Pursuer.

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XVIII. Strouan Murray against his Tutor.

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In a Compt and Reckoning pursued by Murray of Strouan, against Mr. John Murray his Tutor. It was alledged, That the Tutor could not be charged with greater Prices of Farme Victual, than the Candlemas Fiars Yearly. It was answered, That the Tutor consumed most part of the Farms in his own House; and that the most of the Gentlemen in that Country, are in use to keep up their Victual till Summer, and Lambas, and gets far greater Prices than the Fiars, and the Fiars are ordinarly less than what is gotten for Victual in these Bounds. It was Replyed, That for what he spent in his House, he was content to Compt for, at such Prices as other Gentlemen received: But the Tutor to satisfy the Pupils Annualrent, was oft-times forced to sell the Victual before it came off the Ground, or at Candlemass, for ready Money.

The Lords ordained the Prices to be proven, as the Gentlement there-about got for their Victual; referving the Modification after

Consideration of the Fiars, with the Prices to be proven.

XIX. Harper against Home, 15 January 1662.

Passibe like Gesho.

Rif Hillo Cucrativo.

anglito aperson internis

anglito aperson internis

Icol Harper pursues Colonel Home Brother to the deceast Alexander beker. Home of Plenderguest, as behaving himself as Heirto him, and Successor to him titulo lucrativo; In so far as, he intrometts with the Mails and Duties of the Lands of Plenderguest, wherein his said Deceast Brother Died Insest. It was alledged by the Desender, That he Bruiked by a Right from William Home of Linthil, who was Insest in the Property by the said Alexander. It was answered, and offered to be proven, That Linthils Right and Insessent was to the behoof of the Excipient; and so in the same condition, as if the Right had been immediatly granted to the Excipient by his said deceast Brother:

Palsdeliko.

Brother: In which Case, he would have necessarly been Successor titulo lucrativo. It was Duplyed, That tho Linthils Right was to the behoof of the Excipient; yet it cannot infer against him, gestionem pro hærede, seing his Brother was legally Denuded, and that Gestio imports animum adeundi, or intromittendi pro hærede. Neither can a Right from a Mediate Person derived to him, make him Successor, titulo lucrativo to his Brother: Because, in our Law, such a Succession is only sustained against a Person who is aliout qui Successurus, as he who præcipit hæreditatem: But, when a Right made driv to a Stranger, is derived to an appearent Heir, his taking thereof cannot be faid to be praceptio hareditatis; the Heretage being in the person of him, to whom he could not be Heir.

The Lords Assoilzied the Defender from the Passive Titles; but found the Right made to the Defender, made him lyable to the Debt accord. ing to his Intromissions by-gain, and in time coming. They confirm sale is fold?

Glendoning against the Earl of Nithsdail, January 1662.

and the observe Leorge Glendoning pursues the Earl of Nithsdail, as lawfully Charged I to enter Heir to his Father, for fulfilling his Fathers Bond. It was excepted, That the Earl was content to Renounce. It was answered, That he could not Renounce; because he had given Bond to the Earl of Dirletoun, whereupon, to his own behoof, his Fathers Estate was Adjudged from him; to which Adjudication the Defender was affigned by Dirletoun, and he thereupon Infeft and in Possession. It was Replyed, That the Defender might nevertheless Renounce; because nothing could hinder him but gestion pro bærede, or some other Passive Title, which by the Law of Scotland, could make him Heir, or behaving himself as Heir &c. But so it is, That the granting of the foresaid Bond, is not such a Passive Title: But on the contrair, implyes a direct Mind, that he intends not to be Heir to his Father, but to enjoy his Estate singulari titulo: And he is content it be declared, That the Adjudication shall not prejudge his Fathers Creditors; and offered, that, notwithstanding thereof, and of other Rights of Comprising, acquired by him of his Fathers Estate, he should be comptable for his intromission, and for all Lands he has fold, and other benefit he could make thereby, he being fatisfied for what he had truely payed out therefore. It was Duplyed, That the Adjudication upon the Defenders own deed, acquired by himself, was a fraudulent acquisition of his Fathers Estate, and his intromission and disposing on his Fathers Lands by vertue thereof, was equivalent;

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as if he had done the samen by no Right at all, but as apparent Heir: And if such Deeds should be sustained, never Man needed to be Heir, or to enter Heir to an Estate as Heir, which were most absurd, and of dangerous

consequence.

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The Lords found, that the Earl might Renounce, he being Comptable to the Creditors for his Intromission, and for what he has received as the Price of any Lands fold or Wodfet by him, being the true worth thereof; and that in time-coming, he should not ascribe his IV. X/X Right and Possession to the said Adjudication, butt prejudice of any other Right of Adjudication, deduced against his Father, and acquired by him; he being always lyable for his Intromissions with the Farmes to his Fathers Creditors; he being first fatisfied of what he truely payed out for acquiring of the samen. And the Lords declared, That in time-coming, if appearand Heirs should grant such Bonds, whereupon Adjudication or Apprifing should follow to their own behoof; or that that the same at any time should return to them, or to any person to their behoof; they should be lyable to their Predecessors Debts, as behaving themselves as Heirs: And thereupon an Act of Sederunt was made and published. as also the act axiv. Part. 1695. Dona interviry & uxore in

XXI. The Relict of Dalgleish, against the Debitors of her Husband.

He Laird of Logie gives a Bond to umquhile Walter Dalgleish, and Margaret Home his Spouse in Liferent, and to their two Daughters in Fie, for a Sum of Money; whereupon there is a Comprising deduced in favours of the Spouse in Liferent, and the two Daughters in Fie, Thereafter, the faid Walter Dispones the saids Apprised and they Infelt. Lands, to certain of his Creditors, who are Infeft, and in Possession: The faid Margaret Home, upon her Liferent Right and Infestment, pursues for Mails and Duties. It was excepted, That the Pursuers Right is donation intervirum & uxorem, revocked by the Posterior Disposition, made to the Defenders. It was answered, That the Defuncts own Right, was but a Liferent, the Fie being in the Person of the Daughters: Which Fie, as the Father could not Revock; nor could it be any ways quarrelled by the Defenders, their Right being long Posterior thereto: No more could they quarrel the Pursuers Liferent, which being but a mean and necessary Provision for her Aliment, she not being otherways provided by Contract of Marriage; It is not such a Right, as could be Revocable by any second Dispolition

position granted to the Desenders, to whom the Fie and Property of the Lands were Disponed, without mentioning, or reserving her Liserent.

The Lords Repelled the Alledgance in respect of the Answer.

Presumbio juvis. The Earl of Winton against Ramsay. 25. January, 1662.

THe Earl of Winton being Debitor to the Lady Semple his Daughter, in a Sum of Money: She affigns the famen to umquhile Sir George Seton, who was one of the Tutors-Testamentars Nominat and Accepting to this Earl: And Sir George Transfers the said Debt to Mr. James Ramsay of Fawside, who pursues the Earl for payment. ledged by the Earl, That Sir George being one of his Tutors, Accepting, and Acting as Tutor, having acquired Right to a Debt due by his Pupil; Law presumes, that he has acquired the same with the Pupil's own Means or intuitu, that he was Debitor to his Pupil in alse much; and consequently, that ab initio it was taken for his Pupils behoof: And the Excipient In offered to pay the Sum to the Pursuer, he finding Caution to Refound pro tanto, if after Compt and Reckoning it should be found, That Sir George being a Conjunct Tutor, should be found Debitor to the Excipient. was answered, That though Sir George was Tutor, yet he was not Intrometter; the Viscount of Kingstown being Intrometter, against whom the Earl had Action of Compt and Reckoning depending. It was Replyed, That though Sir George did not Intromet, but suffered King stoun, or any of the rest, to Intromett; yet by the Law, finguli tenentur in solidum. adbioh

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The Lords ordained the Pursuer to find Caution to Refound.

XXIII. Ker of Littledean against Pringle of Stitchel, Eodem die.

Are your possession of land, as now prinont.

Are ply completed of Little-dean, pursues a Removing against Robert Pringle of Stitchel, from the Lands of Lurgiecraig, as a part and pertinent of Lands of Newthorn. It was excepted, That the saids Lands were a One action allowant and Pertinent of the Lands of Purdies-Mill; and so Bruiked by him, his to anow passes Authors and Predecessors past Memorie: And which Lands of Purdies-Chairment. Mill, were acquired by a number of Authors, who held the same of the nost of the Were Witnesses adduced, who proved, That the Defender, his Predecessors, and Authors, had posses the Lands past Forty Years, as part and pertinent of Purdies-Mill: But the Insestment produced by the Defender, did not

Of Council and Session, 1662.

19 not prove the Lands to be holden of the Lord Borthwick, but of the Earl of Home. The time of the adviseing of the Cause, It was alledged by the Pursuer, That the Alledgance was not proven, viz. That part thereof bearing, That the Lands holds of the House of Borthwick. It was answered, That there was sufficient Probation ad victoriam causa; to wit, That the Lands Cateatto were possest as part and pertinent of Purdies-Mill: And it was superfluous readers. ly alledged, and not profitable nor necessar to be proven, of whom holden. It was Replyed, That the Pursuer finding the Alledgance so strong, and knowing that he could not prove the famen as it was conceived, he fuffered the samen to be admitted to the Defenders Probation; whereas, if it had been otherways, he would have taken him away with a Reply, viz. That he would have offered him to have proven, That the Defenders Author, after that he was Denuded of Purdies-Mill, possest Lurgiecraig as Tenent to the Heretor of Newthorn: That there is a Muire proper to Newthorn, interiected betwixt it and Purdies-Mill; that it lyes in a several Paroch; and that the Pursuers Author acknowledged under his hand, That Lurgiecraig was a part of Newthorn. It was Duplyed, That this was Competent the time of Litiscontestation: And the Defender has fully proven, that Lurgiecraig has been possest past Memory, by the Heretors and Tenents of Purdies-Mill, as a part and pertinent thereof.

The Lords having confidered the Depositions, and having found, that they fully proved the Possession as a Part and Pertinent past Forty Years; they Assolizied the Defender ab hoc judicio possessorio; and yet in respect of the Reply, omitted bona fide, which the Lords thought not fit now to Discuss post conclusionem in causa; they reserved Action of Declarator of Property to the Pursuer, and the Desenders Desences against the samen, as accords: And if the Pursuer pleased, gave him

Liberty to turn his Removing into a Declarator.

action.

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XXIV. Cuninghame against Tenents of Pomont. 25 January 1662. a quo incept a bond money palabe ages

Cir James Cuninghame, Servitor to the Lord Chancellor, having a Bond, Make of the late Dutchess of Hamiltoune, whereby she bound her self, her whereby she Heirs and Executors, to pay to him a Sum, at the first Term of Whitfunday of Before or Martinmass after her Death: And for his Security, she did assign him than age. alse much of the readiest of her Rents pertaining, or that should pertain to her at her Decease, as should pay the samen. The said Sir James did intimate the Assignation to her Tenents about the time of her Death, and called

led them, and Mr. Dalmahoy her Husband for his Interest, for payment. It was alledged, for John Dalmahoy, That the Obligation incipit ab herede, and the Sum of Money payable, not till after her Death, and consequently the Rents, which, the time of, and before her Death, did belong to her Husband jure mariti, and as dominus bonorum, cannot be made forthcoming for this Debt. It was answered, That the Obligation incipit a Debitore, by which she has obliged her self, her Heirs, and Executors: And though the Term had been 20 Years after her Death, yet cedit dies, it is a Debt upon her a die obligationis: And seing the Husband has no Right to the Wises Moveables or Rents, but cum onere debitorum, the Rents assigned (and which Assignation the Husband cannot quarrel, nor any Deed lawfully made by the Wise when she was foluta) ought to be made forthcoming to the Pursuer.

The Lords Repelled the Alledgance.

In prasentia

aliment. Rollet. XXV. Couper against the Laird of Tosts, I. February.

N a Compt and Reckoning pursued at the Instance of Couper, Executrix to Skeen Lady Tosts her Mothers Sister, against the Laird of Tosts. It was alledged, That the Laird & Tosts could have no Modification for her Aliment after her Husbands Death to the next Term; because her Desunct Husband had a Family in the Merss (with whom she had have might have whom she had a family in the Merss (with January before, she having remained all that time in Edinburgh. It was answered, That her Husband having Died in Edinburgh, and there being no Children betwixt them, she might very well remain at Edinburgh: and for Entertainment, she craved no more but what the Lords should Modifie.

The Lords Modified a proportion of what she was provided to by her Contract of Marriage, which being 2000 Merks Yearly; they made it 600 Merks.

And it being alledged, That this 600 Merks should be allowed to her in part of payment to her of the 1000 Merk which was payable to her at the Whitsunday after her Husbands Death. The Lords sound, it should not be allowed, for at what time so-ever a Liferenter of an Annual rent Dies, the Terms Annual rent due after their Death, will not fall to the Liferenters Executors, but to the Heir; and therefore they allowed the Maintenance till the first Terms payment of the said Annual rent, who if she had Died before the said Term, her Executors would not have gotten the Annual rent.

XXVI. Bells

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XXVI. Bells against Wilkie, 25 January 1662. Robidu.

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Sobel, Grisel, and Dorothie Bells, Executors confirmed to umquhile Patrick Bell their Brother: Ifobel Dies before the faid Testament is Execute. her Son James Wilkie is Executor confirmed to his Mother, and as Executor. obtains a Decreet before the English Judges, finding that he had Right off not of to his Mothers Third of the Confirmed Testament of his Mothers Brother cords. This Decreet by a review, is brought in Question before the Lords upon this Ground of Iniquity, committed by the English Judges, That there is no Representation in Moveables; That the up-giving of an Inventar, and confirming an Executor, is only nudum officium, which Dies with the Executor, and if there be moe Executors, it accresseth to the rest, who, if they all Die, there is necessity of a Dative quoad non executa to the Defunct. and the Executrie Confirmed, is no-ways Transmissible by Affignation before Sentence; and consequently, not to any by way of Representation. It was alledged, to have been the confirmed and constant tenet and custom; Jenet. that in such Case there is no Representation, but that the Goods als well as the Office accresseth, where the Testament is not Execute. answered, That the Difference is great betwixt Executors Confirmed being nearest of Kin, and Executors Strangers to the Defunct, or who are not nearest of Kin, as they have Natures Right, and the Legal Right competent to them; So, the confirming Dative, has the same to be in their Perfon als effectually as the ferving of an Heir doth in the case of Heretable Bonds, and Heir-ship Moveables: And it were against all Reason, that the Calamity of one dying Executor, having Natures Right fo established in her person, should prejudge her Children, when the delay of new Execution , a) doth not probably ly upon her, but upon other Impediments; and if her Creditors should in her time Arrest any of the Executrie before Sentence. and she in the mean time Die; It were also against Reason and Justice, that the Creditors should be prejudged, who as they may affect the Executrie before Sentence, so may the same executrie be transmitted by an Assignation, if the Executor have Right as nearest of Kin, which is more than nudum officium, and our Law and Practique make nothing to the contrary.

The Matter being fully and learnedly disputed and seriously confidered by the Lords; They sound, That the Son had a Right to the Mothers Third, and that jus Representation is had place where the Exceptor being nearest of Kin Died, the Testament not execute; and Declared they would decide just so in time coming.

Lairds

marchet Submission 86al. The Laird of Livingstoun, against the Fewars of Falhouse February 1662.

Superiour. Probation. Here being an Action of Molestation pursued before the Sheriff of Linlithgow, betwixt the Laird of Living stoun and the Fewars of Falhouse. anent some Marches betwixt them, wherein Mutual Probation was adduced: And it being proven for Livingstoun, That his Author the Earl of Calander, and the Fewars, having submitted the Cognition and Determination of the Marches to indifferent Arbiters; They did fet the March-Stones by consent of the Parties, in respect whereof, the Sheriff decerned the March-Stones to be fixed and keeped, according to the former Determination: This Decreet being called in Question, the Reasons of Reduction were mainly these two. First, There was nothing to verifie the Submission, and it could not be proven but scripto. Secundo, The Lord Torphichen Superior to the faids Fewars, was not called, and now he concurred in the Redu-To the first, It was answered, That betwixt Neighbours, the matter ?! of Marches might very well be determined by a verbal Reference to indifferent Friends, and both Submission and Determination might be proven prout de jure, without Write. To the second, It was answered, That the Superior had no prejudice, and consequently no Interest; and if the Property should fall in his hand by any Casuality, a Decreet given against him, he not being Called, will not prejudge him.

The Lords Assoilzied from the saids Reasons, in respect of the An-

fwers, which they found Relevant.

Compensation.

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The Relict of umquhile Robert Inglis Merchant, being Creditrix by her Contract of Marriage, confirmed Executrix to her Husband; and in the Inventar having given up a Debt, owing to him, by the Earl of Murray, the gives power to Crawford to purfue the Earl for payment.

It was excepted, That the Defender ought to have Compensation; because der in a Sum of Money assigned to him by Doctor Lighton, now Bishop in Dumblane. It was answered, 1. Non relevat, unless the Assignation had been intimat before the intenting of the Cause, to the Executors or Near-Institute.

The contract of umquhile Robert Inglis. 2. Tho it had been intimat, yet it

could give no Ground of Compensation; because the Reliet by her Contract was a priviledged Creditrix before any other; and in prejudice of her in equal to Priviledge, no Affignation could be granted or received, to take away that Preference from her, which the Law gave her.

The Lords Repelled the Alledgance.

XXIX. Chalmers against Dalgerno. January 1662. Pagio. hllo

Arjory Chalmers, as Executrix confirmed to Patrick Gray her Hufband, having pursued the deceast William Keith for payment of a Debt, the recovered Sentence: And after his Death the pursues William Dalgarno, as Intrometter with his Goods, before the English Judges. In which Purlute it was alledged, That the Defender was Donator to the Defunct's Escheat, and so could not be conveened as Vitious Intrometter with the Defunct's Goods, his Goods, by the Rebellion, falling to the Fisk, and they were not his the time of his decease. This Process in a review, was de novo disputed. It was alledged, That the English Judges did wrong in finding the Alledgance Relevant, unless it had been alfo alledged and proven, That the Gift was granted before the intenting of the Cause, seing the Defender's Intromission being ab initio Vitious: And the Pursuer having intented Process against him upon the Passive Titles: now Right acquired ex post facto, could take away the Jus, and Passive Title acquired to have by his former Citation: And tho' the Rebellion gave Jus to the King or his Donator, if the Gift had been timeoufly granted and declared, or legal diligence done at the King or his Donator's instance; Wet there being no such thing done, and the Detender being in culpa immiscere se bonis that were in the Defunct's possession, his own Fault and Vice makes him liable. Likeas, an Arrestment used of a Rebel's Moveables will be unquestionably preferred to the Donator by a Gift after the Arrestment: Yea, though the Gift were prior, unless it were cled with Possession, or diligence done by a general Declarator before the Arrestment, the Arrestment will be preferred.

The Lords Repelled the Alledgance, and found, That the fublequent Gift could not purge the preceeding Vitious Intromission.

XXX. Coupar against the Laird of Tosts. January 1662. Mquhile Dame Jean Skeen, Lady Tofts, being infett in an Annualrene of 2000 Merks out of her Husband's Estate; and she having nominat Jean Coupar, her Sister-daughter, her Executrix, the said Jean pursues

a Poinding of the Ground against this Tofts and the Tenents of the Ground. for payment of the bygone Annualrents, resting from the death of the said deceast Tofts, to the death of his said Relict; and also for an Aliment due to the Relict, betwixt her Husband's decease, which was in February, and the Term of Whitfunday thereafter, which was the first Terms payment of the the Annualrent. It was alledged, There could be no Aliment: 1. Because the Relict remained not in Familia till the Term, but by her self lived at Edinburgh, the Family being in the Country. 2. If any Aliment should be decerned to her, it should deduce pro tanto of her Whitsunday's Annualrent. It was answered, to the First, That her Husband having died at Edinburgh, and having no Children the Relict could care for, the might lawfully remain at Edinburgh: And all the Aliment her Executrix craved, was a Proportion of the Annualrent provided to her by her Contract of Marriage. To the Second, it was Answered, That till the Term of Payment of the Annualrent, the Relict could not live perquire: And though a Liferenter for of the Lands, dying before Whitfunday, will not getAliment of the Move- ? ables till the Term of Payment of her Liferent, which possibly will not be payable till Mertinmass, or betwixt Tule and Candlemass; yet in this Case there is a vast difference, because a Liferenter of Lands dying after Whitsunday before Payment, at Mertinmass, or after Mertinmass; her Executor will get an half Years Rent, she dying before Mertinmass, and a whole Years Rent dying after Mertinmass, whatever the Term of Payment of her Rent be: Whereas a Liferenter of an Annualrent, dying betwixt Terms, at any time, her Executrix will get nothing of the Annualrent payable at the Term thereafter.

The Lords decerned a Proportion, not to be allowed in the subse-

quent Terms Annualrent,

apfris not boand to produce on XXXI. Adamson against Ker. January 1662

N the Declarator of Redemption, pursued by Patrick Adamson against Mr. for Mark Ker; it was found, There was no necessity to produce the Rever-mark from being in a Contract betwixt the Desender and the Laird of Wolmet, and which Contract was the Desender's own Evident, and the Pursuer a Singular Successor to Wolmet, who, notwithstanding, did produce the time of the Order, and now does produce an attested double under the hands of two Nottars, the principal Contract being in the hands of one of the Clerks of Session for the time, and which the Pursuer could not command, and in

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Itan Hei an other Process betwixt Wilkie and Thomson, The same was found, tho there was not an attested double produced, the Pursuer being a singular Successor, and the Defender having the Reversion in his own hand. His forms fully established by act of Br

XXXII. McClellan against Buchanan, January 1662.

abond cannot be regig-

The Lords found, that Buchanan as Assigney to a Bond granted to his Cedent, and Registrat after the Cedents Death, could not Charge thereupon, because the Procuratory of Registration, dies with the Death of the receiver, als well as of the granter. His altern by act. 15. Part. 1693. 869 a 4-39 Part. 1696.

XXXIII. Lord White-Kirk against Ednem. February 1662. Componsation.

He Lord Whitekirk, as having Right from the deceast Laird of Lugtoun to a Wodset upon Ednem, containing a Reversion and Backtack. It was Excepted by Ednem, That Lugtoun the Cedent, was satisfied
of a part of the Sums, In so far as, he did assign a Bond made to him, by the
deceast Lady Ednem, in savours of one Trotter, with Warrandice from his
own Deed: And notwithstanding of the Assignation and Warrandice, Lugtoun had Discharged the Old Lady Ednem of a part of the Sums which they
instantly verified, and that therefore this Wodset should be declared satissied pro tanto. It was answered, 1. Contra singularem successorem, a Personal
Debt by way of Retention or Compensation, cannot take away a real Infestment; which, without a valide Renunciation or Discharge, cannot so
denude the party Insest, as that a singular Successor may not acquire the
Right thereos. 2. This ground of Compensation is not Liquid nor Constant, seing it depends upon an Action of Warrandice against Lugtoun's
Heirs.

The Lords Repelled the Alledgance, in respect of the first Answer chiefly.

XXXIV. Tenents of Musewell against Ladies Tounger and Poynding the ground.

Elder thereof. February 1662.

Aule for those making in

IN the double Poinding pursued by the Tenents of Musewel, against the Old Lady and young Lady thereof, both of them being Insett in Annualrents furth of the Lands. And the Tenents and young Lady complaining

Hein oflyne

Lady, when she came to Poind, she was always debarred by the Old Lady.

The Lords found, That unless the Old Lady should Poind within Twenty days after each Term of Payment of the Tenents Dutie, the Young Lady should Poind without any Impediment from ad the Old Lady.

XXXV. Hoyd against the Duke of Lennox.

In a Process pursued by one Floyd against the Duke of Lennox, as Heir Male to his Predecessor: The Lords found no necessity to Call and Discuss the Heir of Line, unless it could be made appear, that the Heir of Line had any thing in Scotland to discuss.

ayment ... XXXVI. The Laird of Bassindean, against Bell's. in Spot wildo' uso in paying more than it one.

Eorge Home of Bassindean as Tacksman of the Teinds of the Paroches of Gordon and Woolstruther, pursues William and George Bell's, for certain quantity of Teind Duties, whereof they have been in use of payment. It was alledged, Their Teinds are valued by a Decreet of Valuation, and that they are obliged to pay no more, but according to the said Valuation. It was answered, That notwithstanding of the Valuation, they have been in use of payment of a greater quantity, by the space of 10. or 7. Years. It was Replyed, That voluntar use of payment, cannot prejudge the payers in surther than during their voluntar payment, and cannot take away their Right constitute by the Decreet of Valuation, no more, than if a Vassal should for divers Years, pay a greater Few-duty, than what is contained in his Insestment.

The Lords found the Alledgance Relevant.

absolute was ranged in a Laird of Fairny against the Lord Melvil. February 1662.

He Laird of Fairny, having disponed to the Lord Melvilather Minor, the Lands and Teinds of Pitlour, with Absolute Warrandice; the Lord Melvil charges Fairny to warrand the Disposition for 13 Bolls of Victual payed to the Minister for his Stipend, fince the Year 1646. It was alledged by Eairny, That the Warrandice cannot be extended to Ministers Stipends, unless the Warrandice had per expressum carried the samen; especiments.

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ally seing, since the date of the Disposition the Lord Melvil has been still in use to pay the Minister, without seeking Relief till now: And Fairny offered to prove by Bogie, who was the Bargain-maker, and by the rest of Style the Lord Melvil's Curators, That the Lands and Teinds were bought according to a Rental, which they payed over and above the Minister's Stipend. It was answered, That the Absolute Warrandice was opponed per expressum fet down in the Disposition, and that the Price of the Lands and Teinds were equivalent thereto, being freed of the Minister's Stipend: And no Tutor, Curator, nor Witness Oath, could be taken to take away Write.

The Lords, before Answer, ordained the Tutors and Curators Oaths

to be taken.

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XXXVIII. The Executors of Musewell against Lourie of Maxweltoun. Exercicion

THe Executors of Douglass of Musewell pursued Lourie of argumental Maxweltoun, for payment of a Debt. Against which, It was alledged, That the Defender should have Compensation, because the Defunct was resting him alse much, by vertue of an Assignation made to him of certain Bonds owing to Alexander Douglass Writer, and others his Cedents. minuas answered, That the Assignation being recovered after the Defunct's Death, it could not operat a total Compensation, in prejudice of the rest of the Creditors, to whom the Executor is comptable: But all it could do, is to put the Excipient in the condition of the Cedent; that is, to come in pro rata with the rest of the Creditors, to the exhausting the Inventar. It was Replied, That the Defender had made a lawful Assignation or Bargain with the Cedent, before the rest of the Creditors had done any Diligence; by which he might as lawfully Compense, as if he had acquired the Assignation in the Defunct's Life. It was Duplied, That if it were lawfull for a Debitor to take an Affignation, after this manner, after his Creditor's death, then any Debitor may defraud the most of the Creditors by Collusion with fome, such as he pleased, and agreeing in what Terms he thought sit.

The Lords refused Compensation, and ordained Maxweltown by his Affignation to be only in the condition of the Cedent, if he had not

affigned.

Thereafter a Bill being given in, to be heard in præsentia, which was granted. And when it was debate, It was alledged for the Executors, That Maxweltoun and his Cedents could never be heard to make use of the Assignation

nation to be preferred to the rest of the Creditors; because long before the peneric the granting thereof, the Executors had conveened both the Cedent and Affighold inchanginey for accepting the Inventar amongst them pro rata; after which Cita-R tion, none of the Parties called, could prejudge others pendente lite. The Lords found this Relevant.

Viscount of Stormonth against the Creditors of Annandale. February 1662. (non alismando)

non Strakendo Dobitum. Y a Tailzie under the Great Seal, the Lordship of Scoon, upon the Re-Descarator ignation of David Viscount of Stormonth, was Resigned in savours of the faid David and the Heirs Male of his Body; whilks failzieing, to Mungo and the Heirs Male of his Body; whilks failizing, to Andrew Lord Balvaird and the Heirs Male of his Body; whilks failzieing, to Sir William Murray of Clearmont and the Heirs Male of his Body; whilks failzieing, to the nearest Heirs Male of the House of Balvaird: Upon this Provision, That it should not be lawful to the said Mungo, nor any other Person contained in the Tailzie, or their Heirs Male, to Violat or Dissolve the said Tailzie, or Dispone of Wodset the Estate, or any part thereof, or to do any deed whereby the same may be Evicted or Comprised from them, without the special Consent of all the Persons contained in the Tailzie, or their Heirs, being of perfect Age: And if any of the faids Perfons, or their Heirs, should cortraveen the faid Provision, That they should loss their Right and Title to the faid Infeftment, and of all the Lands and others therein-contained ipso facto, and the faid Charter and Infeftment, with all Right and Title thereof. should be Null and Expire, and their Right thereof should accresce and belong to the next Heir of Tailzie who is immediatly provided to succeed failzieing the Contraveener. Whereupon the Viscount of Stormonth, who now is, being Son and Heir to Andrew Lord Balvaird, having intented Action of Declarator against the deceast Earl of Annandale, in his own time, as he who contraveened the Clause, and against his Creditors, Comprisers of the Estate of Scoon upon Debts owing by him; to hear and see it found, That the Earl had amitted his Right, and confequently the Creditors Bonds and Comprisings were Null: And that it should be lawful to the Pursuer to enter to the saids Lands as Heir of Tailzie to Mungo Viscount of Stormonth, or otherways to the faid Earl of Annandale; free from payment of his Debt; and that by a special Service to the saids Landsonly. It was alledged, 1. That Clauses de non abienando cum pacto de non contrabendo debitumo

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of it.

in prejudice especially of a Third Party, a lawful Creditor bona fide contracting, are no ways fultainable in Law and Justice; Seing the Creditor is not obliged to know the Qualifications and Conditions of his Debitor's Infeftments, unless publick Inhibition had been served. 2. The Certification contained in the Tailzie, annulls only the Controveeners Right, but not the Right made to the Party Creditor. 3. It appoints in case of Contravention, the Estate to pertain to the next Heir of Tailzie of the Controveener, and consequently the Pursuer must be Heir to the Earl of Annandale. and so liable to his Debts and Deeds. It was answered, That Clauses de non alienando were not prohibited by the Law; and Law reprobates no Transactions, unless prohibited: Yea, Clauses de non alienando are usual in many Infeftments granted by Superiors to their Vassals, which, if controveened, makes the Lands return to the Superiors, without respect to Deeds or Debts done by the Vassal: And in all Waird-holdings, de jure est, that the Vassal may not Dispone without the Superior's Consent, but in the Cases excepted by Law: And therefore the Condition de non alienando, in this Tailzie being lex talziæ & feudi, is real, and obligeth all that medle with the Debitor to know the Condition and Points of his Infeftments with whom he contracts; And the Interdiction mentioned in his Right and Infeftment thereupon, is as publick as any Personal Interdiction or Inhibition whatfomever. 2. The Clause appointing the Controveener's Right to be Null, and the Estate to belong to the next Heir, cannot be interpret cum effectu; that is, That the Estate should pertain to him, absque onere of that which is the Subject-matter of the Controvention, else Annandale might have and about down-right broken the Tailzie any ways he pleafed, which is abfurd. And it belongs to the next Heir in respect of the real Interdiction; just as if the Estate of a Person interdicted, belongs to his Heir, notwithstanding of any Personal published Interdiction. 3. And if the Pursuer shall take the way to be ferved in Special to this Estate, as Heir to the Earl of Annandale, he may lawfully do it. And the Lords ought to declare, That it should be free of the payment of his Debts and Sums, just as if he were to be Retoured Heir to any Person, either Simply interdicted, or Partially interdicted from Alienation of fuch a part of his Estate: In which Case, if the Heir should be only served Heir in Special to that part, and with a Declaration, That the Heir intends not be Heir to any other thing, he would Reduce all Bonds and Deeds made by the Person interdicted, so far as the samen might affect that part of the Estate.

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The Matter being at great length Debated, from Law, Practique, and Reason; The Lords Repelled the Alledgances, and found that the Pursuer should succeed to the Estate free of Annandales Debts and Burdens, whether he was Heir of Tailzie to Annaldale or Stormouth, or to either of them, wherein he might take the most legal way as by Advice he should think sit.

Poynding of the ground. Douglass of Morton, against the Tenents of Kinglassie. February 1662.

IN the Action of Mails and Duties pursued by Douglass of Mortoun, against the Tenents of Kinglassie; wherein, for Mortoun there was produced an Insestment of Annualrent granted by

Hamiltoun of Kinglessie to

Hamiltoun his fecond Son, Author by Progress to Mortoun, with a Decreet of Poinding the Ground thereupon. It was alledged by the Creditors, Comprifers, That the Infeftment and Decreet, could furnish no Action or Interest in their prejudice, because the Infestment was base, holden of the Granter, wherein the Annualrent was Suspended during the Granters Lifetime; whereas, long before the Term of Payment, and before any Decreet could be effectually given thereupon for Poinding of the Ground, they were Infest, holden of the Superiors. And if they had been Compearand, they would have alledged, That no fuch Decreet for Poinding the Ground, could have been granted, during Old Kinglassies Life; seing the Annualrent was only payable after his Death, and the Ground only then poindable therefore. It was answered, That though the Annualrent was Suspended; yet the Citation of the Tenents and Heretor, for poinding the Ground, and Decreet following thereupon, made the Decreet fo publick, that no Posterior Infestment whatsoever could be preserved thereto: And though the Decreet was not to have present Execution, yet the Ground might be decerned Poindable: The Term of payment being first come, and Addition by-gain, just when an Infestment of that Nature is granted for an Annualrent pavable at the very next Term: The party infelt, may raise his Summons and obtain Decreet and Sentence before the Term.

The Lords Repelled the Alledgance, and preferred the Annualren-

ter.

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XLI. The Earl of Marshal against Brag. June 1662.

The Earl of Marshal obtains a Decreet in his own Court, against his Tenent Charles Brag, for payment of a certain quantity of Farme, which was Suspended upon this Reason, That he ought to have Compensation of a liquid Debt owing by the Earl to him. It was answered, That the Compensation is not receivable post sententiam by the Act of Parliament 1592. It was Replied, That an Act of a Barron Court is not to be repute such a Sentence as that Act means by; seing such Sentences are only against Tenents for their Masters Duties, wherein Desences consisting in jure, are proper to be disputed, neither can Tenents have the benefit of Advocats in such Courts.

The Lords Sustained the Compensation by way of Suspension.

XLII. Baillie, against the Heir and Executor of Jamison. Police molecally

By a Minut of Contract, betwixt William Baillie and umquhile John of Jameson, William is obliged to Dispone a Tenement of Land to the said John, his Heirs and Assigneys: For which, John obliged himself, his Heirs and Executors, to pay to William 3300. Merks. The said William pursues the Relict as Executrix, and the Heir of the said umquhile John, for payment of the price. It was alledged by the Relict, That she and her Child the Heir were willing to Pay the Money upon a Disposition of the Land to her in Liferent, and to the Heir in Fie: And the Reason why she should be Liferenter, is, That the price being the greatest part of her Husbands Estate, and lying Moveable by him, she would have had the third part thereof as Relict. If her Husband had not been obliged to pay the samen as the price of the Lands, sher Liferent thereof is scarce a Recompence, for loss of her third. It was answered, That the Alledgance is not Relevant hoc loco, but she may Agere against the Heir.

The Lords found the Alledgance not Relevant hoc loco, and inclined to think, That if she were pursuing the Heir, she should early have a Terce of the Land, just as if her Husband had been infest therein.

Puric

Obligoment ho a fact improftable but not impossible. XLIII. Purie against Lord Couper. June 1662.

Py a Minut of Contract betwixt the Lord Couper and the Laird of Purie Fotheringhame: Purie having a Right of Wodset, and Comprising of certain Lands, pertaining to the Lord Balmerinoch. The Lord Couper taking burden upon him, dispones a parcel to Purie, and obliges himself to cause Balmerinoch dispone with him, with Warrandice mentioned in the Minut. Couper being Charged upon the Minut, Suspends upon this Reason, That it is impressable by him, to cause Balmerinoch Subscribe, and he is content præstare damnum Sinteresse. It was answered, That it is not a fact impossible of it self; and he being expressy bound to it, he ought precisely to sussilist it; especially, seing Balmerinoch being his Brothers Son, he ought to have considered his own difficulty in it. Likeas, Purie was content to take a Right from Couper himself, of the Lands, and real Warrandice out of his other Estate, in case of Eviction by Belmerinoch.

The Lords found, That Conper should Dispone, taking burden upon him for Balmerinoch, and should be obliged Personally to the Warrandice mentioned in the Minute, as if Balmerinoch had Disponed with him; and assigned a time to Couper to deal with Balmerinoch for subscribing the Disposition, till which time, the Lords superseded the Ex-

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tracting of their Decreet and Sentence.

Habile Repale. XLIV. Thomson against M'Kittrick. June 1662.

R. John Thomson pursues a Reduction of a Seasine given to William M'Kittrick, of certain Tenements in Dumfreis, upon the Act of Parliament, That it was not given by one of the Bailies, nor by the Town-Clerk and Registrat. It was answered, That the Seasine was given in Anno 1653. When the Kingdom was under the Power of the Englishes, by Thomas M'Birnie then holden and repute Provest, who then made choise of Robert Neuall Sheriff-clerk, who was not only Nottar to this Seasine, but to 15 or 16 more, in respect James Cuninghame Town-clerk had not taken the Tender, conform to a publick Proclamation then emitted: And there is no necessity of Registrating Seasines of Burrow-lands.

The Lords, in respect of the Time, found the Alledgance Relevant, That M'Birnie was repute Provost for the time, who had made use of this Nottar as Town Clerk, not only in this, but in other cases. This also found in July 1666.

Bowis

XLV. Bowis against Barclay of Johnstoun.

Robert Bowis alledging, that John Wood was Debitor to him in a cerpoion tain Sum of Money, as Cautioner for John Strauchan of Haugh-head, and having Arrested certain Goods in the hands of John Barclay of Johnstoun, pursues to make the Arrested Goods furthcoming. It was Excepted by the Defender, That the Goods pertained to himself, by a Disposition from the said John Wood, for a very Onerous Cause, viz. For Farmes and Duties

Defender, That the Goods pertained to himself, by a Disposition from the said John Wood, for a very Onerous Cause, viz. For Farmes and Duties owing by him to the Desender, his Master, long before the Arrestment. It was answered, That the Disposition was made retenta possessione, for the space of divers Months, and before any Possession apprehended, Wood was denunced Rebel at the Pursuers instance, and consequently the Disposition was null quoad the Pursuer. It was Replied, That the Disposition being made before the Disponer was Rebel, he might lawfully suffer the Disponer (his own Tenent) to keep still the Goods, as long as he pleased, the Rebel's Escheat not being Gisted and Declared: And the Act of Parliament doth not anull any Disposition before the Rebellion, but only such as are made stante Rebellione.

The Lords found the Alledgance and Reply Relevant. The post practice 1721.

XLVI. Wright against Butchart.

Here being an Adjudication purchast of certain Tenements in Leith, wealth and of the Heirship-Moveables, belonging to umquhile James John-stoun in Leith, against Isobel Johnstoun his Sister, who had renunced to be Heir to him. This Adjudication is assigned to James Wright Hat-maker, Husband to the said Isobel, who sets the Lands to Alexander Comrie; and he as Tenent, enters to the Possession thereof, and of the Heirship-Moveables within the House; which Alexander having possess the House and Goods divers Years, he did thereafter dispone the Goods to John Butchart, who medled there-with; where-upon the said James Wright pursued Butchart for the price of the Goods. It was alledged tor Butchart, That he ought to be Assolized, because he had Right to the Goods by a written Disposition from Cromrie, who as Owner, had possess the same without payment of any Dutie therefore; and conform to the Disposition, the Goods were delivered to the Defender by way of Instrument, and he in.

Possession accordingly. It was Replied, That the Desender cannot be heared to say, that Comrie was Owner; because, the Goods were per expression Adjudged from the appearand Heir of James Johnstoun, who was in possession thereof, and they extant within his dwelling House: And Comrie cannot say that he was in Possession thereof, otherways than a Tenent in the House, under James Wright, to whom, though he payed not Dutie expressly for the Goods; yet having taken the House from him for payment of Mail and Dutie, and as Tenent, having entered to the Possession of the House where the Goods were, and accordingly, having possess both House and Goods, any possession Comrie had, was the Pursuers Possession, and consequently the Desenders Right, and pretended Possession, cannot be respected.

The Lords Repelled the Alledgance, in respect of the Answer or

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Letter to his Brother Williams of Latter to his Brother Will

for of Sagion He Laird of Niddrie writes a Letter to his Brother William Wachope, some 24 Years since, William being then in Stockholme, and by an unfubscribed Post-script, he says, that he had sent him 5 lib. 10 f. Sterline, and that he should send him als much about Whitsunday; and if he did behave himself no otherways than he has done, he should have als much To long as Niddrie lived: Whereupon, William pursues his Brother for payments of all Years by-gone, and in time-coming during the Lairds Life. was alledged. 1. The Post-script is Null, being unsubscribed. Post-script bears, So long as the said William should behave himself no other ways than he had done, which imports no Obligation, expresty obliging Niddrie. Likeas, There was no other Obligation, or Cause obliging Niddrie to it, this being only an expression of Kindness to his Brother, which cannot tie him any further, but only according to Niddries own Difcretion: And within two Years thereafter, or thereby, it is well known, that William came to Scotland, and by his Brothers help and Mediation, he Married a Rich Widow, and got a great deal of Means: And William not being then very able himself, Niddrie became Cautioner for him in his Contract of Marriage for 10000 lib. So that the Post-script being meda pollicitatio, without any cause except Affection, not having any express Obligment, and his Brother having shown him so much Effectual Kindness thereafter, by which he was put in so good a Condition, not having made use of this Post-script for so long a time, till of late, the Defender ought

to be Assoilzied. It was answered, The Post-script was opponed, which had no other Qualification in it, but if the Pursuers behaviour should be no other than it was before, which his Brother had not reason to Question, he being constantly an Honest Man, and of late a Bailie of Edinburgh.

The Lords Sustained the Alledgance Relevant, and referred it to the Defenders own Diferetion and Determination, whether the Pursuers Carriage had been such, as that he Merits from him the Sum lybel-

led, which if he thought not, they Affoilzied him.

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XLVIII. Master of Gray against Burntfield.

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Olert Stewart, Provost of Linlithgow, in Anno 1624. gives Bond to Gan ong Alexander Glen, for 151 lib. which was affigned to umquhile William Gray Merchant, and transferred by the Master of Gray, as his Executor to Stephen Bruntfield, who having pursued Robert before the English Judges; There was a Defence proponed, viz. That Alexander Glen the Creditor, being Debitor to umquhile Alexander Reid Gold-smith; the said Alexander Reid did Arrest the said Sum in the hands of the said Robert Stewart, and thereupon recovered Sentence against him; the said Alexander Glen being called, and that long before the Affignation made to the faid umquhile William Gray, at least after the Intimation; whilk Defence was found Relevant. And now the faid Stephen Bruntfield raises a Reveiw, and alledges, he got wrong by Sustaining the foresaid Defence, and not being Relevant, unless the Defender had also alledged payment; and that Sentence being obtained against the said Robert Stewart, he ought to have Sufpended upon Double-Poinding. It was answered, That the Defence was justly found Relevant, and the English Judges did no wrong; because, Glen being clearly Denuded by the faid Sentence recovered against him, at the instance. of Reid, and the Defender constitute Debitor thereby, it clearly excludes any Posterior Right made by Glen; especially considering, that now after so long time, the Defender has truely loft his Discharge granted to him by Reid; and so it were most unjust, he should be troubled by a Party who has no Right: And though often-times, Sentences prior and posterior, or Assignations, are all Suspended by the Debitor, against whom the same are recovered; yet, where the Sentence is not only recovered against the party in whose hands the Sum is arrested, but also against the Debitor for his Interest; There is, in this Case, no necessity of a double Pointing against a person having Right from the Debitor, post sententiam.

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The Lords Sustained the Decreet, and found, that the Desence was not unjustly sustained.

Sufforthing hair XLIX. Laird of Balnagouan against Dingwall. July 1662.

Nan Action of Removing, pursued at Balnagouan's instance against Rorie Dingwall, upon a Gist of ultimus Hæres, and Insestment following thereupon. The Lords found, No Process could be sustained, unless the Gist were declared: For though the Defunct had neither Heir, nor appearand Heir; yet of necessity there should be a Declarator, whereunto, at least, all Parties having interest should be Cited at the Mercat Cross in general; in just as to a Service as Heir, the Brieve is so executed by Law.

ministery annal. Mr. Patrick Weems against Parochiners of Laswade. July 1662.

IN a Process betwixt Mr. Patrick Weems and the Parochiners of Laswade; The Lords found, That a Minister dying on January, the following Year's Stipend is due to his Executors as annat. This being the Practice formerly, yet now being doubted, it was thus decided. Soo at with Jan.

LI. Lockhart against Kennedy. July 1662.

Tenents, compeared James Lockhart, who alledged, There can be no Frocess upon the Pursuer's Insestment; because it being a Seasine of Lands within the Town of Air, it ought to have been given by one of the Bailies and Town-clerk; whereas it is given by the Sheriss and Sheriss-clerk, by a Commission from the English Judges, who had no Power. 2. It is given by a Precept of Clare constat; whereas it should have been given upon a Restour, or upon a Cognition of sworn Neighbours. It was answered, That the time of this Insestment there was no Magistracy in Air, nor Bailies, in regard they resused the Tender; and consequently the Judges might very well Commissionate the Sherisss. And as to the 2d. It was answered, That as the Bailies might have entered an appearand Heir by Hesp and Staple, without Service or Cognition, so as well by a Precept of Clare constat.

The Lords Repelled the Alledgances.

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LII. Claperton against the Lady Ednem. July 1662. Ponsion by a Laich.

Mquhile John Edmistoun of Ednem gives a Pension to Jean Stirling of two Bolls Wheat, and ten Bolls Oats, payable yearly out of the Mains of Ednem, whereunto George Claperton her Son being Assigney, purfues the Lady Ednem & the Tenents for payment, from Cropt 1647 to 1661 inclusive. It was alledged for the Lady, she stands Infest in the Mains, and by vertue of her Infeftment, in possession, continually since the Death of her Husband: And the Pension is no real Right, especially being granted by a Laick, and whereupon never any Decreet followed against the Tenents. It was answered, That the Pension was cled with Possession by Payment made by her Husband in his time, and by the Defender her felf for the Year 1647. It was Replied, That the Pension is but a Personal Obligement by which the Defunct did oblige him and his Heirs to pay the same out of his Rents of the Mains; which Personal Obligement cannot carry a Real Right as an Infeftment; and any Payment made by the Defunct, was only for fulfilling. his Personal Obligement. Likeas, the Payment made by the Defender was as Executrix, for fulfilling her Husband's Obligement, out of his Moveables, which cannot be a Ground to affect the Rents therefore.

The Lords found the Alledgance and Reply Relevant.

LIII. Leitchfield against Pott.

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Homas Leitchfield, English-man, pursues Charles Pott in Kelso for 47 lib. Sterline, as the Price of two Hogsheads of Canary, and two Hogsheads of French Wine, sent by the said Thomas to him, conform to his two missive Letters to the Pursuer for that effect. It was alledged Absolvitor: Because the first missive Letter directed the Pursuer to send the best Canary and best French Wine, whereas it was offered to be proven, That the Canary was most unsufficient, spoiled Malaga, and the French Wine was old spoiled Claret; and that the Desender did write to the Pursuer of the Insufficiency thereof, and desired them to be taken back by him. It was answered, That the Desender should have, immediatly after his receipt thereof, sent and intimat the same to the Pursuer, and required him by way of Instrument to receive the same under Protestation; whereas on the contrary, he did, not-withstanding of his Letter sent to the Pursuer, Sell and Dispose there-upon; and after the receipt of the Wine, he by his second Letter desired the Pursuer

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fuer to fend him more. It was Replied, There was no necessity of a Nottar and Instrument, seing by the first Letter he desired the Pursuer to send him special Good Wine; and by the other Letter he told him of the Insufficiency of the first: And tho' by a second Letter he did write for more, that I etter was sent within a sew Days after the first Wine came, at which time, being troubled with the Carriage, it was not ready to pierce; nor could it be known, whether it had been Good or Bad Wine, till after many Months, that the Pursuer had resuled to take away the Wine: Neither did the Defender Dispose upon the Wines, till many Months after the Pursuer had resuled to take away the Wine and then he sold it at a small rate and avail, lest it should altogether perish.

The Lords, before Answer, ordained the Pursuer to adduce Witnesses, for proving the Sufficiency of the Wines when they were sent from Leith, and that he sold of that same Wine to others als sufficient, and for what Price. And ordained the Desender to adduce Witnesses, for proving the Condition of the Wine when it came from Leith to

Kelfo, and when it was Settled and Sold.

LIV. Tutor of Stormont against bis Pupil. December 1662.

Here being a Compt and Reckoning purfued betwixt Mr. John Murray

Tutor of Stormont, and the Viscount his Pupil: The Tutor charged him Bong warfangith 1000 Merks, with the Annualrents thereof, whereunto he was affignbrekin. ed by Mr. Patrick Murray his Brother's Son, and which Mr. Patrick was incivillan, feft in an Annualrent furth of the Lands for his Security. It was alledged, hov. 27. That the Tutor could not charge his Pupil with this Sum; because by the Law Novel. 27. It is not lawful to a Tutor or Curator to take Affignations or Rights of any thing belonging to his Pupil, where-with he may Charge him: And the Reason is, Because if this should be allowed, then a Tutor or Curator finding Bonds lying in his Pupil's Charter Chift retired, may it Collude and take Affignations to fatisfied Bonds, from the Creditors, and ruine the Pupil. Likeas, this Affignation was granted without an Oncrous Caufe, except 100 Merks: And it is not constant but there might have been a Discharge of this Debt in his Pupil's Charter Chist before the recovery of the Assignation. And farther, this Pursuer being also Tutor to the Defender's Father, by Contract betwixt them in his Majority, the Debt owing by the Father was then given up to be 9000 Merks, whereof this was no part. Likeas, the Pursuer was in pessima fide to take Assignation; because

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cause the Debt was payable to Mr. Patrick and the Heirs of his Body, whilks failzieing to return to the House: And in prejudice of the Family he ought not to have taken a Right to this Debt, whereunto his Pupil was to succeed failzieing Heirs of Mr. Patrick's Body. It was answered, That the Civil Law doth not bind Us: That there is nothing more ordinary, that when Tutors and Curators advance Money of their own for payment of their Minors Debts, they take Affignations, and there-upon crave payment of what they truely payed therefore: That the Affignation grants only the receipt of 100 Merks, for which, and for the Love and Favour Mr. Patrick carried to his Uncle, he did affign him to this Debt; with this Condition, That he being then to go out of the Country, if he should return, his Uncle should be Comptable to him, and Repone him. So that in effect, it was but a Tailzie and Provision of the Sum to him after Mr. Patrick's Death. That there was no Presumption that the Debt was payed, because it was all Mr. Patrick's Portion, and due by a registrat Infestment, which if it had been payed, it would have been Renunced by a registrat Renunciation: That in the Contract betwixt the Tutor and his first Pupil, there is a Clause by which the Pupil is obliged in general, To Relieve the Tutor of all Debts owing to Mr. Patrick and another Brother; which Obligement to Relieve, is equivalent as if this Debt and Affignation had been referved: And though the Debt was appointed to Return, failzieing the Heirs of Mr. Patrick's Body; that did not take from him the Power of Disponing. It was Replied, That the Alledgance and several Members thereof were opponed; and that by the faid Contract, the Tutor was discharged by his then Pupil, without making a particular Account, and that thereby got gratis a Discharge of the Reversion of the Lands of Couden, which his Pupil probably would not have done, if he had known of the Right he had taken to the faid Debt: And if it had been intended, that the faid Right should have been reserved intire, the Tutor should either have caused insert a particular Reservation thereof, or should have taken in his ownName a Bond from the Laird therefore. It was answered, That the reason why the Tutor did not mention the Assignation in the Contract, nor took not the Pupils Bond, was, because Mr. Patrick being out of the Country, might have returned, and in that Case, he was to be Reponed. It was Duplied, and offered to be proven, That Mr. Patrick was long before Dead, and Repute, and holden to be so in the Country.

The Lords found the Alledgance Relevant, the It pil proving that Mr. Rarriak was Dead the time of the Contract, and repute to be for

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by his Friends in the Country. Ratio, because if he was alive, and thought to be so, the Debt was his own after his return, and the Tutors Right thereto, was in that Case not Effectual; but if he was not Dead, the Lords thought Mr. Patrick should have exprest a Reservation of it. or taken Security for it; and they thought the general Obligment to Relieve, was not equivalent to a Refervation. Likeas, they conceived, that the Tutors part was not fair, confidering the Provision to return in favours of his own Pupil.

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Andard A. Thomas Hamiltoun Advocat, being Executor Creditor to umquhile James Hamiltoun Merclant, and having Licence, pursues Hugh Confirmation Hamiltoun for payment of a great Sum of Money, alledged due by him to to the Defunct. It was alledged, 1. That by Back-bond it was declared, that this Sum is not payable, unless Hugh Hamiltoun should obtain Compensation for the like Sum owing to him by the Heirs and Executors of umquhile Patrick Wood, and that by vertue of, and upon an Assignation to the Defender, by the faid umquhile James, in and to an equivalent Sum owing to him by the faid umquhile Patrick, where-unto he did affign the faid Hugh; Ita est, he has not obtained the saidCompensation; but the Process long ago, having been pursued against the said Hugh, it is not as yet put to a Close, nor do the Executors of Patrick Wood insist, so that Hugh is not Hugh offered to pay what was owing to this Pursuer, and for which, he was decerned Executor, which he is holden to accept, feing his interest by payment ceaseth; and that as yet there is no Testament confirmed, by which the pursuer may be obliged to do Diligence for any Inventar, or make the same furthcoming. It was answered to the first, That the Executors of Patrick Wood will possibly never insist, nor will Patrick trick urge them to insist: And the Pursuer was content to find Caution, to refound cum omni causa, if he should not obtain Compensation, when he should be purfued. To the 2d. The Purfuer was not obliged to accept of this Debt, seing he was content to confirm before Sentence. Likeas, he had a Right to the whole Moveables of the Defunct from toun the Defuncts Sister, and only nearest of Kin. It was answered ut supra, and that the Sifter was Dead before Confirmation, and confequently the Moveables in Law, belong to the next nearest, and the Right made by the Sifter is void by her Death, in regard her own Right was never established

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in her person, nor in the person of any Executor, whom she as nearest of Kin could pursue. Likeas, Hugh Hamiltoun was by this Latter Will, left universal Legator, which being lost, he has nowProcess, for proving the Tenor, depending.

The Lords found the Offer to pay the Debt Relevant; and that the

Right from the Sister was Void and Null by her Death.

Compagation. Children of Wolmet against Moristoun. December 1662. Pay leguital.

DAtrick Edmission of Carden, having Comprised from the Laird of Wolmer, the Reversion of a Wodset granted to James Loch, which the said James disponed by Progress to Mr. Mark Ker of Moristoun. Comprising, Carden uses an Order of Redemption against Mr. Mark, and pursues a Declarator. It was alledged, no Declarator, because no Confignation was really made, but fimulatly by Money taken up again, and now at last the Money should be consigned in the Clerks hands to be given up by the Defender. It was answered, the Money was truely Configned, and whether taken up or not, it was nothing to the Defender, seing the Pursuer must be answerable for it. And now he offers the Equivalent, viz. To compense that Money with a greater Sum pro tanto resting, to the Pursuer by vertue of a Right in his person, from the Children of Wolmet, who has a Sentence standing at their Instance, against the Defender for a greater Sum. It was Replied, That the foresaid Sentence could be no ground of Compenfation, because it lyes under Question and Review as pronunced by the English Judges unjustly.

The Lords before Answer, ordained the Defender to repeat his Reasons of Review against the Reply of Compensation or Reten-In præsentia.

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LVII. Dick against Baillie. December 1662.

of the complete to inhomment, any o Can't ar vant Cir Andrew Dick pursues James Baillie Compriser of certain Lands in Joseph n. 4 Orkney, pertaining to Sir Andrew, to hear and see it found, that James was satisfied by his Intromissions within the Legal, and produced a Rental, according to certain Tacks set to the Tenents, where-with James intrometted, or should have intrometted, and be comptable conform to the Tacks, he having medled at least, with some of the Duties from the I ennents. It was answered, That if any Tacks were set to the Tenents, they

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were for such Duties as the Tenents were not able to pay, and what he de facto intrometted with, was all the Lands were worth, and payed before the Tacks; at least, if they had been forced to pay greater Duties, the Lands would have been casten waste. It was Replied, That a Compriser once medling with the Tenents, cannot give down of the Rents payable by the Tenents at the time of his Entry.

The Lords ordained a Commission to be direct to examine the Payment made by the Tenents the Years preceding the Tacks, and what Condition they were in the time of the Comprisers Entry, and whether they might have been able to keep the Lands if they had been distrest at for the tull Duties contained in the Tacks, and if the Lands could have

been made Tenent-sted if these Tenents had been removed.

In real actions as Doclarator of proch.
The pfon last in fort from regular I VIII. Nicol against Hope. 3 January 1663.

Atrick Nicol Merchant, as Heretor of the Lands of Easter Grantoun, pursues a Declarator of Property, against Sir Alexander Hope Heretor and Possession of the Lands of Wester Grantoun, and to hear and see him decerned to desist from Molesting the Pursuer in his Possession of the Lands lybelled; and namely for demolishing that part of a Dike within these sew Years built within the bounds of the Pursuers Lands. It was alledged, That there could be no Process, because all parties having Interest were not called, wiz. The Heir of the Laird of Craighal, who stood last Insect in the Lands of Wester Grantoun, the Desender not being Insect, It was answered, That the possession table Disposition, and Procuratory of Resignation, the same Lands were resigned in favours of the Desender, and his not Expeding an Insectment, could not in Law nor Reason put the Pursuer to Cite his Author who is Minor.

The Lords Repelled the Alledgance in respect of the Answer.

LIX. Dumbar against Graham. 8 January 1663.

Obert Dumbar of Windiesheills, and Janet Baxter his Spouse, being adebted to Catharin Dumbar in a certain Sum, Catharin caused Arrest an other Sum, in the hands of William Ramsay as Debitor to the said Janet Baxter and her said Husband sure mariti; whereupon a Process was intented before the Lords of Council and Session, for making the Sum Arrested furthcoming. After the first Arrestment, diverse Weeks, Robert Graham Merchant Arrests, and pursues a furthcoming before the Bailies of Leith,

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and obtains Sentence, whereupon William Ramsay raises Suspension of Multiple-Poinding. It was alledged for the first Arrester, That he should be preferred notwithstanding of the secondArrestment and Sentence, in regard of his prior Diligence, and that nothing done in the second Process could prejudge the first Arrestment and Dependence of surthcoming thereupon, the first Arrester having done what he could.

The Lords preterred the first Arrester.

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LX. Gordon against the Laird of Leyes. 8 January 1663.

SIr Thomas Burnet of Leyes (now deceast) gives a Bond of 9000 Merks and 9000 M to Margaret Burnet his Daughter: Of which Bond, she and John Gordon of Brachlie her Spouse, pursues Exhibition and Delivery against this Laird of Leyes, and Mr. Robert Burnet Advocat Haver. It was alledged, That the Bond is Conditional, that she should Marry with Consent of the Laird of Leyes for the time; but so it is, that she Married without Confent of Leyes, or any of her Father's Friends. 2. That by an Agreement after the Marriage in Write, her Husband and Leyes condescended upon a lesser Sum in satisfaction of the said Bond, and so the Bond is innovat and taken away. It was answered to the First, That Matrimonia sunt libera, and fuch Conditions should be holden pro non adjectis, as has been often found, and that the first Bond is acknowledged by the second Agreement. And as to the faid Agreement and Alledgance founded thereupon; It was answered, It was Conditional, if the Sum condescended on were not pun-St. Ctually payed at Whitfunday 1661. the former Bond should stand in force. It was Replied, That the Condition resolved only in a Failzie, which the Defender might yet purge, confidering especially the time and scarcity of Money, and that the faid Margaret had so far miscarried against her Friends: And the Bond was never a delivered Evident, but put in her Uncle's hand to be furth-coming to her, if she should carry a-right.

The Lords found the fecond Alledgance or Reply, Relevant: And

that the Defender might yet purge.

LXI. Campbel against Lady Kilchatton. 15. January 1663. Confirmation of information of informati

Ajor William Campbel being infest in an Annualrent out of certain Straid.

Lands belonging to the deceast Ninian Stewart of Kilchatton, pursues a Poinding of the Ground, and obtains Decreet, which is Suspended against

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against him on the one part, and the Lady-liferentix of Kilchatton on the It was alledged for the Relict, That she is Infest in the Property upon her Contract of Marriage, whereby she was provided to the Lands by old Kilchatton her Father-in law, and her Husband; to whom and her, the Father-in-law was obliged to grant Infeftment in Conjunct-fie, and she is accordingly Infest. It was Answered, That any Infestment that she and her Husband had, it was only Base, to be holden of the Superior not Confirmed; whereas the Charger was Infest, and in Possession, not only by uplifting his Annualrent, but by a Decreet for Poinding the Ground, which st could not be prejudged by a not Confirmed Infeftment, being Null before the Confirmation. It was Replied, That the Charger could not obtrude the Nullity of her Husband's and her Infeftment, seing her Husband was his own Author. Duplied, That the Charger had obtained a Confirmation of her Husband's Right ad hunc effectum allenarly to make his Infeftment of Annualrent valid. Triplied, That the Confirmation of her Husband's Infeftment did Confirm hers also, notwithstanding of any such Clause. alied. That the Confirmation being past only to secure the Charger, and on his ownExpenses, actus agentis non operatur ultra ejus intentionem; just as if there had been a Procuratory of Resignation in favours of both Husband & Wife, and the Refignation had been made only in favours of the Husband, and not the Wife. Answered, If it had been so, the Infestment would have operat in favours of the Wife, as was found in the Case betwixt Lochinvar and the Relict of the Laird of Blairguhan, wherein Resignation being made and past, and Insestment there-upon in favours of Blairguhan and his Lady, nevertheless Seafine was only given to the Laird and not to the Lady; the Lords nevercheless found that the Seasine was Profitable to the Lady.

The Lords found the Relict's Infestment sufficient against this Charger. And with-all, they considered what was not alledged for her, viz. That in favorem of a Relict's Insestment upon her Contract of Marriage, for her Liferent Right, a Base Insestment to be holden of the Superior not Consirmed, was sufficient against a Singular Succession.

for, as has been formerly decided.

D.lx11.p.47.

LXII. Beg against the Laird of Carnock. 16 January 1663.

ROKEN : Ir Thomas Nicolfon of Carnock having granted Bond and Infestment of Andeirof problem of mullrent for 4000 Merks, to Thomas Beg and his Spouse, the longest state. Ever of them two in Conjunct-sie, and to the Heirs or Bairns to be gotten betwixt

betwixt them: Whilks failzieing, to two Bairns of a former Marriage Thomas and Margaret Begs, whereupon not only Thomas and his Wife, but the faids Thomas and Margaret are expresly inseft: Thomas and his Wife having required and charged for the Money, Sir Thomas Suspended upon this Reafon, that he could not be in Security to pay to the Chargers, because they could not give him a valid Discharge and Renunciation of the Infestment. without the two Bairns who stand infest. It was Answered. That Thomas is only Fiar, and his Wife in Conjunct-fie with him, which Conjunct-fie, as to his Wife, resolves only in a Liferent: Likeas, by the Clause of Requisition, the Money is payable to him and her, and they have power to redeem: and if there were Bairns of that Marriage (the Infeftment not being redeemed) after their Decease, they behooved to be Heirs of Provision to their Father, in regard he died last Vest and Seased as of Fie: And in this Case; Nomen Hæredum & Liberorum of the Marriage signifies I.S. one thing, and the two Bairns of the former Marriage (failzieing Children of this Marriage) behooved also to be Heirs of Provision to their Father: And the Seafin given to the two Bairns nihil operatur, and R.g. is null, because no Body can be Seased but the Fiar or Liferenter; and it signifies no more, then if a Seasin were given to an Heir of Tailzie substitute in an Infestment, which would be null, seing no such Person can be Seased, but upon a Retour, as Heir of Tailzie.

The Lords found, that the Conjunct-fie stands in the Man and Wife, and that the two Daughters were only Heirs of Provision Substitute; failzieing of the Heirs of the Marriage; and because the two Bairns were not called in this Suspension, therefore Carnock raised a Double Poinding against them also, wherein the Father was preferred, there being no Compearance for them; yet the Lords considered the Case,

and decided in jure.

LXIII. Birch against Douglas. 14 January 1663.

Arah Birch Widow in London, Charges Catharin Douglas Relict of John Muire Merchant, for payment of a Sum of Money contained in a Bond granted by him and her to the Charger. She Suspends upon this Reafon, That the Bond is not Obligatory, but Null, as being granted by her stante Matrimonio, during which Vide Jan. 1665. time, no Wife can validly bind her self (though she Fisher against Ker. may Dispone with Consent of her Husband) and if

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the do, the Bond is ip fo jure Null, whether it be judicially ratified by Oath

or not: This Matter having never been decided before, was ordained to be heard in præsentia, where it was fully Debate among the Advocats and among the Lords themselves, from the Civil Law, our Law, and Practique, and from the Consequences: From the Civil Law It was Alledged, That a Woman might renunciare beneficio senatus consulti velleiani made contra Intercessiones mulierum, and oblige her felf notwithstanding thereof, multo magis in this Case, where an Oath is interposed not to come in the contrar of the Bond. From our Law and Practique, King James the 3 ds. Parliament, its declared, That a Woman may not come in the contrar of her Oath: And hence it is, that in our Practique, Liferenters or Heretors disponing and ratifying judicially upon Oath, cannot question their Deed done stante Matrimonio with confent of their Husbands, nor can Minors by the Civil Law, nor by our Law and Practique Question, their Deed being Ratified Judicially with an Oath, acting That they shall not Quarrel. And the Consequence of Perjury is dangerous, seing Oaths ought to be keeped que fine dispendio salutis eterne servari posfunt. It was Answered, That Senatusconsultum Velleianum has not place among us, and it is general for all Women: This by our Law, is only in favours of Wives, binding in their Husbands time, who may be presumed, ex metu reverentiali, to set their Hands to Bonds, not only to exhaust any Fortune of their own, but to involve themselves in such Burdens as they are never able to pay, and so should be rendred Miserable, either for Fear, or for Respect to their Husbands: Nor is the last Case of an Obligement, and of a Disposition by a Wife, alike; because a Woman, facilius inducitur, se obligare, quam dare aut disponere, and when she gives and dispones, it is no more than she hath, but she may bind for more than she hath in infinitum: Hence it is, That if an Heretrix Wife, should Dispone with absolut Warrandice, with consent of her Husband, tho the Disposition be valid, yet the Obligation of Warrandice will be Null. 4. And further, an Oath adhibite to fuch Dispositions, renders not the same valid, as being invalid by our Law, without an Oath; for Dispositions made by Wives with consent of their Husbands, are regulariter valid, unless they be quarelled super vi & metu, which is a legal ground to quarel all Dispositions whatfomever, made by Men als well as Women; but because Women are more easily to be induced to dispone, than Men, & levior vis & metus is ?! Relevant in Women than in Men: Therefore, to eshew all Question, the judicial Oath of the Wife is taken, that the was not Co-acted, to cut off all ground of Question whatsomever: And tho a Minor when he binds with Confent

Consent of Curators, judicially swearing not to Revock, should not be restored; the Reason is, because the Bond of a Minor, with Consent of his Curators is not ipso jure Null, but eget semper restitutione in integrum super capite Minoris ætatis & læsionis, and must be intented intra annos utiles; but by our Law, the Wifes Bond is ipso jure Null, without necessity of Revocation or Restitution, and she is in the case of a Minor binding, having Curators, without their Consent, or of Pupil-binding, whose Bonds are ipso jure Null, and cannot be made valid by any fuch Oath. Likeas, there be? many cases, expresly in the Civil Law, wherein, without Question, the Adhibition of an Oath renders not the Deed valid, and many other Cases disputed among the Doctors; and Oaths indeed ought to be keeped, and it will be so judged in Foro Cali; but some Oaths are not to be Authorized by Civil Judicatories, who are to look to the Advantage of Civil Societies, and the Publick Civil Interest, such as this, in the Case of Married Wives in General: And therefore, all that the Civil Judge can do, is to leave the Swearer to God and his own Conscience.

The Lords Repelled the Alledgance, and found the Bond Null, notwithstanding of the Oath. In prafentia

LXII. Campbel against the Lady Kilchattan. 16. January 1663. Base infest.

Note foresaid Process pursued by Major Campbel, compeared Hugh Harman miltoun Baillie of Edinburgh, and Alledged, that he ought to be preserved and because he Comprised against Kilchattan, and upon his Comprising is Insest, and holding of the King as Superior, before the Major's Confirmation. It was Answered, That Kilchattan being only Insest by a base Insestment to be holden of the Superior, and not confirmed; the Comprising could Comprise no more but the Personal Right standing in Kilchattan's Person, the Insestment being in-valid till Confirmation; and the Insestment upon the Comprising signifies nothing, till Kilchattan's Insestment be confirmed; and therefore the Major's Insestment of Annualrent being Anterior to the Comprising, the subsequent Confirmation, makes the Insestment preserable.

The Lords Repelled the Alledgance. & preferred the major. In præsentia

LXIII. The Earl of Roxburgh against Kinneir Minister. V. Robieu.

16 January 1663.

R. Andrew Kinneir Minister at Calderslear in Anno 1650 obtains a 39310.

Decreet of Locality, against his Parochioners, and namely against the

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the Earl of Roxburgh, for his Lands of Auchniounselhil and Mil-burn-head, which are burdened with a Locality, far above their Proportion of Rent; the Decreet was Suspended in the Englishes time, upon this Reason, That the Earl was neither Called, nor Compearing, and the Decreet was given to his very great prejudice; the English Judges nevertheless, found the Letters orderly proceeded; the Earl intents a Review upon the same Reason. It was Alledged, That the Decreets of the Commission for Plantation, &c. were declared to be Decreets of Parliament, and the Tenent of the Land was Cited. It was Answered, That in all Judicators what somewer, Decreets a-2-3 gainst Parties, must be given upon Citation, otherways they are Null, and this Nullity is receiveable before the Judge Ordinary; and the Citing of a Research, is not sufficient where the Master is most concerned.

The Lords found the Decreet Null, and Reduced.

Reduction.
Equity.

Equity.

Exist. Eliot against Riddel. 16 January 1663. VI. Robiou.

Rchibald Eliot of Medlestaid, Wodset his Lands to John Riddel of Muisely, for a Sum of Money, under Reversion, and with a Clause irritant, bearing, That if precisely, at the Term the Money should not be payed, in that Case, the Reversion to be Null; whereupon a Declarator is obtained for not payment, before the English Judges. There is a Reduction pursued of this Decreet, upon this Ground, That he was not Compearing in
this Decreet; and tho in the Minutes of Process he was marked Compearing by his Procurator, to whom a Day was Assigned for Purging the
failzie, yet at that time he could not compear, because he was lying Bedsast:
And it were against Reason, that the Desender, by his Calamity, should
be under such Disadvantage, the Lands being near double worth the Money Hist.

The Lords found the Reason of Reduction Relevant, in respect of the Condition of the Pursuer for the time, by Sickness, and of the exorbitant Advantage the Desender would have, if the Decreet should

stand.

Sunt Red court. The Earl of Calendar against Russel. 17 January 1663.

IN a Process pursued by the Earl of Calendar against Thomas Russel. It was found, That a Vassals Son being intest, holding of the Superior, reserving the Father's Liferent, the Son is not obliged to keep the Superiors Head Courts, during the Father's Lifetime.

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LXVL Pollock against Anderson.

He deceast John Anderson, by his second Contract of Marriage, is only of Land, bliged to provide his Conquest to the Heiner of Marriage, is only of Land, bliged to provide his Conquest to the Heirs of that Marriage: And ha far in he conquests a Room to himself in Liferent, and William the eldest Son of lyfered & bo the first Marriage in Fie; whereupon they are both infeft by Charter and Sea- I chafed. The faid John being Debitor in a Bond of 1000 lib. to Arthur man. Pollock, who charged Christian Anderson to enter Heir to her Father William, Singhold who was Successor titulo lucrativo post contractum, debitum to his 6. nwork Father John, in fo far as the Land was thereafter purchast to his Father in by with the Liferent, and to his Son in Fie: And therefore the faid Arthur having pur- Espaciol no fixed the faid Christian ut Supra. It was Alledged, That William the Sorting. was not Successor titulo lucrativo to his Father, because the Charter grants. the Receipt of the Price from his Son; and the reason why the Father was Lifrenter was, because he had a prior rental standing in his Person, who conform to the Charter payed the Few Duty to the Marques Superior. Likeas, it was offered to be proven, per testes omni exceptione majores, that the Son did de facto pay the Price. It was Answered, That the Father being Liferenter must be prefumed to be purchaser.

The Lords found, the Alledgeance Relevant, notwithstanding

of the Reply.

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And it being Proven, both by the Charter and famous Witnesles, that the Son being Major payed the Money.

They Affoilzied the Defender from the Passive Title.

And because it was alledged, That the Seasine was given by Father to the Son only propriis manibus, without an adminicle though confirmed by the Marques, The original Charter being in the first place given to the Father Heritably, and in the same Charter mention being made of a Resignation made by the Father in savours of himself in Liferent and his Son in Fie, for Sums of Money payed to the Superior by the Son, which Resignation was not showen.

The Lords nevertheless sustained the Insestment, cled with the Seven Years Possession, reserving Action of Reduction as accords of the Law.

the stings tragstupone LXVII. Stewart against Sprewel 21 January 1663.

R James Stewart a Person alledged to be Idiot or Fatuous, and Robert Stewart Provost of Linlithgow, as he who has obtained a Gift of Curatory to him past in Exchequer, pursues Mr. John Sprewel for payment of a Debt owing to the Idiot. It was Alledged, No Process, unless the Idiot were declared by a sworn Inquest, upon a Brieve out of the Chancery, and that the Pursuer Robert were also declared nearest Agnat, and a Person fit to Administrat; and any Gift he has purchased is periculo impetrantis. It was Answered, That the Alledgance is founded Super jure tertii and is not competent to the Defender, whom the Pursuer is content to fecure by sufficient Caution. 2. Tho the nearest Agnat were compearing, proponing the Defence, yet it were not proper to him, unless he gift would offer to pursue a Breive, and obtain the Idiot declared, and himself to 34. be nearest Agnat, according to the Order of the Brieve of Idiotry; and it hist. is most lawful for the King to grant a Gift, when the parties interested will not, nor do not pursue their Interest; Yea, it is necessar it should be so, least furious Persons and Idiots be left destitute of Governours.

The Lords sustained the Process, the Pursuer sinding Caution to make the Sum surthcoming, butt prejudice always to the nearest Agnat to serve, in which Case, this Gift is to expire; this they did the rather, that divers of their Number did declare upon their certain Knowledge he was turn'd Idiot & rei sum minime providus, which if they had not declared, the Lords would have caused produce him before them-

selves, and examined him whether he had been so or not.

Distrossoftants. LXVIII. The Earl of Home against the Earl of Lothian.

deil supcooring proculion. 21 January 1663.

Here being an Excambion betwixt the Earl of Home's Predecessor, and Sir John Ker of Hirsel, of the Abbacy of Jedburgh, with the Lands of Hirsel; and the said Lands being distrest by a Poinding of the Ground, pursued at the instance of Ker, and Mr. John Bruce her Spouse against the E. and his Tenents: The E. pursues the E. of Lothian, to hear and see it found and declared, that he may have Recourse against the Lordship of Jedburgh pro tanto, esteirand to the Distress. It was alledged, No Recourse, because no Distress by a Sentence. It was Answered, That the dependence

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of a Process is a Dis ress, wherein, if the Earl of Lathian shall compear and obtain Absolvitor to the Earl of Home, the Decreet of Recourse will evanish.

The Lords sustained Process, superceeding Execution against the the Lordship of Jedburgh, till the Earl of Home, or his Lands should be distrest by a Sentence.

LXIX. Zeaman against Oliphant. 21 January 1663. Mahicide

Here being a Process pursued at the instance of William Zeaman Advo Innualn. cat, against Mr. Patrick Oliphant Advocat, for the Mails and Duties of the Lands of Newtoun. It was alledged, That the Defender should be Affoilzied, because he bruiked the Lands by Gift & Infeftment of forfaulture under the Gteat Seal, through being of Sir James Oliphant declared fugitive in a Criminal Court, or denunced Rebel, not only for Matricide, having killed his Mother, but for Murder under Trust, having killed her under Trust. It was Answered, That by the Act of Parliament against Parricide, the Par-act 220, Parl ricide's Heretable Estate is declared to pertain to the Collateral and next Heir, excluding only himself and his Heirs in Linea Recta. Murder under Trust was lybelled, yet it was not proven, nor was the Parricide Cited to compear before the Justices under any higher pain than the pain of Horning, and not under the pain of Treason, and only his Moveables by the Act of Adjournal were ordained to be Escheat; and therefore his Heretable Estate could not fall, nor belong to the King by any such Determination or Act of the Justice Court, and the Infestment under the Great Seal is obtained periculo impetrantis.

The Lords Repelled the Alledgance in respect of the Answer. In præsentia.

LXX. Mein against Niddrie.

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Lizabeth Anderson, Daughter and Executrix to Mr. David her Father, makes an Assignation to Robert Mein Mearchant, of certain Debts, whereupon the said Robert raised Process before the Commissars, and the Assignation was thereaster lost. This Assignation was made by Elizabeth, with consent of Allan Keith her Husband; and the Tenor thereof is, by a Summons, craved to be proven and made up; the Pursuer having produced divers Adminicles. It was Alledged for the Laird of Niddrie, who had Right from John Anderson, Brother to Elizabeth, and who had Right from her, That casus amissionis must not only be lybelled, but specially condescends

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ed on, and made probable; because it is offered to be proven, That there was a Factory granted by the said Elisabeth to this Pursuer, and upon which Factory he did pursue, and obtain payment from some of the Debitors to the said Elizabeth's behoof, and upon Trust; and if any such Assignation was thereaster granted, it was upon Trust also, it being ordinary to intrust Friends with such Assignations, and to the Granters to keep them beside them, or in their own proper Power though intimate; and this Pursuer cannot say, nor can he make it appear, that ever he gave Money for this Assignation, nor that ever it was in his Custody as his own Evident: And therefore, unless casus of his amissions thereof, be condescended upon, there can be no Process. It was Answered, That casus amissionis can in very sew cases be condescended upon, far less proven; Men often-times tining their Writes, not knowing how or where.

The Lords found that in the Case of such a Personal Writ, whereupon nothing sollowed but Intimation, and the intenting of an Action, and upon Consideration of many other Circumstances, Casus amissio-

mis fhould not be condescended upon.

LXXI. Kirkland against Richard, January, 1663.

Ohn Kirkland alledging him to have a Tack from the Earl of Loudon of the Lands of Gilfit, fets to William Richard a Subtack for payment of necolar don't e Principal Tack-Duty to the Farl of Loudon and 30 lib. to the faid John: For which 30 lib. William being Charged, Sufpends upon this Reason, That he was warned to remove by the Earl, which Warning he did Intimate to 1 the faid John Kirkland, and required him to make furthcoming the Principal pal Tack to the Suspender, to the effect he might defend against the Warn-article ing, which the Principal Tacks-man and Charger refused; whereupon the Suspender having nothing to defend him, was forced to take a new Tack from the Earl; which he did, otherways to remove, or to be under the hazard of violent Profits. It was Answered, that the Reason was not Relevant; because the Suspender might have defended himself against the Warning, in respect the Charger (Setter of the Sub-tack) was not warned: For though he had no Tack, or that his Tack had been expired; yet feeing he was in Possession by setting of a Sub-tack, and having payed Duty by himself or Sub-tacks-men, he bruiked per tacitam Relocationem. It was Replyed, That the Earl of Loudon had no necessity to warn the faid John Kirkland, since he neither had Right, nor was in Natural Possession, the Master of the ground being only obliged to warn the Possessor, unless the Possessor bruik as

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Tenent to another Master who has Insestment, or has from the Pursuer a Tack standing for Terms yet to run, or such a Right as might desend the Master, if he had been warned; and Tacit Relocation is not in the case where the Tacks-man is not in Possession, and though it were, yet the Master using Warning against the Possessor, the presumption of tacit Relocation is taken away.

The Lords found the Reason of Suspension Relevant, and suspended the Letters simpliciter.

Homologation.

LXXII. Rires against Rires, January, 1663.

Y Coutract betwixt Mary Rires and Mr. William Rires, the faid Mary for the Sum of 1000 Merks Dispones to the said Mr William a Right of Wodfet, which she had of the Lands of Strathodie, from the house of Urie. with this Condition, she being then Minor, if at her Majority she should revock the Contract, in that Case Mr. William should put her in her own Place, the paying to him 1000 Merks. Upon this Contract and her Revocation at her Majority, she and Alexander Hay her Husband charges Mr. William, who suspends upon diverse Reasons, namely, That albeit the Charger did revock, yet after her Majority and Revocation, she and her Husband has homologat the Bargain, in fo far as she and her Husband having fitted Accompts with him, they have acknowledged themselves to have received a part of the said 1000 Merks. It was Answered, That Mary does not subscribe the Accompts, and her Husbands Deed cannot prejudge her of her Heretage, to which he has no Right but just Mariti. 2 do. Nor can it reach him, because the Money was not received animo homologandi: But there being a Submission standing betwixt them, he took a Bond of Borrowed Money for the Sum.

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The Lords having considered the Accompt, which expressly bears a Receipt of a part of 1000Merks, and only subscribed by her Husband, they found it an Homologation of the Bargain, so far as might take away the Husband's Right quocunque nomine, but prejudice of the Wises Heretable Right, if the were not denuded otherways. The like the Lords found this same Session. Straiton against Frazer and Forbes in the case of an Heretable Sum belonging to the Wise before in Legacy by her Predecessor, and homologat by her Husband

LXXIII.

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LXXIII. Laird of Dairsey against Hay, January, 1653.

Sin Gearge Morison of Dairsey gives Bond to Umquhile John Bell and Margaret Hay his Spouse in Literent, and to the Children of the Marri-Consent of her Children and their Curators pursues for payment. It was Alonst. ledged, That the Relict is only Liferenter, and the Bairns not Infeft; So that 54 a Renunciation cannot be granted till some be Infest as Fiars. It was Answered, That the Conception of the Bond being in Favours of the Bairns as Fiars, they with the Mother may well renunce; and it is against Form, that the Parents being but Liferenters, the Bairns can be infeft as Heirs to a Liferenter. It was Duplyed, That tho the Bond was conceived in favours of the longest liver of the two Parents; yet seeing the Children are not Infest, nor can be Infeft under the general Name of Children, and Children might have failed, and may fail to be more or fewer of the Marriage, as Providence disposeth; it is just alike, as if the Bond had been conceived in favours of the Heirs of the Marriage; but with this Difference, That if it had been in favours of the Heirs, the Right of Sonship would have been preferred. Now, if it had been so conceived, no question the Heirs of the Marriage would have been Infeft as Heirs to their Father, consequently the Bairns, whether Sons or Daughters, or both, must be served as Heirs of Provision to the Father: And in this Case the Word Liferent must resolve in a Conjunct-fie.

The Lords found that the Bairns should be Infest as Heirs of Provisi-

on to their Father, and Renunce.

the face of Candi. LXXIV. Laird of Skermorlie against Brown, January, 1663.

2 Loopanitertia 3 refoinles as IR Robert Montgomery of Skermorlie and John Brown being Comprisers of the Estate of Fordel, They to eschew Questions and Processes betwixt themselves, did enter in Agreement; and before the Lords Tarbat and Stair did agree, That Sir Robert should Dispone to John his Comprising, being the first, for Payment making of a confiderable part of the Sums therein contained, at two Terms, and that in fo far as may concern the faids Lands of Fordel, the rest of the Estate, and the Comprising thereof to be Reserved to Skermorlie for fecurity of the remnant Sums contained in his Apprifing. According to this verbal Agreement, before and after the first Term of Payment, the said John Brown writes several missive Letters to Skermorly, shewing him the Diffficulty

ficulty to get Money, but that he was using his best Endeavours; offers him readily to deliver a part, and to give him Security for the rest; and says in his Letter, That he was not to pass from any thing agreed upon betwixt them; besides that, he had received the Keys and the Possession of the House. and had fettled with the Bishop of Dunkeld for the Feu-Duties, whereupon Skermerly pursues John to hold Bargain, and to compleat it in Write. It was Alledged, That before Bargains be ended in Write, which of necessity must have Write, or are appointed to have Write, Locus est pænitentiæ. And the Defender upon reasonable Considerations, passes from his Bargain, being content that Skermorly may enjoy the Benefit of his first Comprising as accords, &c. It was Answered, That where a Party is obliged by Write, or by subscribed Articles, condescends to make a Bargain, or where res now est integra; in either of these Cases panitentia has no Place. Itaest, The Defender has obliged himself by Write: In so far as he declares by his Letter. he is not to pass from any thing agreed upon, which is as if he said I shall end the Bargain agreed upon, and as much as if Articles had been fubscribed for making a Bargain. Neither is res integra, in respect of the Tradition of the Keys and Possession of the House, and of John satisfying the Superior, as to the Feu-Duties. It was Replyed, That these Words in the Letters, He is not to pass, import no Obligation, but an Expression of his Intention at that time, and that he did not then intend to pass from it. which cannot take away his Liberty before subscribing of Writes. And it were unreasonable, that the Defender should be tyed to a Bargain where the Pursuer is not, who may refile or not refile, tho the Defender had a Purpose to hold it: And as to the receiving of the Keys and paying of the Feu-Duties, it can import nothing, but that then he intended to hold Bargain, and which Keys he might receive to try what Accommodation he might have, in case the Bargain were ended, and he might have payed the Feuduties as a Compriser, where the Pursuer has no Prejudice. There were diverse Practiques alledged for the Defender, namely Anno 1646, tetwixt Lochtor and Mr. William Moir, which did not every way hold ..

The Lords Affoilzied, and found that the Defender had locum peni-

tentiæ, me maxime contradicente.

I have known it often found, where one of the Parties bound himself by a Minute, and the other not; The other diverse years after, has recovered the Minute out of the bands of a third Party haver, and has caused the Subscriber fulfill the same, though till then he did never declare his Minde, whether he would hold Bargain or not.

LXXV.

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it is pay a Y Contract of Marriage betwixt umquhile Archibald Campbel of Ottar and Anna Stirling; the Lands are provided to the Heirs Male of the for coming Marriage, and if there be but one Daughter, the is provided to 6000 M. Propayable by Ottar's other Heir Male when the should be fit for Marriage, and an occasion should offer: There being but only one Daughter of that Marriage, whom the Mother hath Alimented fince the Husbands death in Anno 1651. Just. The Mother pursues this Ottar, Brother and Heir Male to the faid deceast Archibald, for the Daughters Aliment fince the faid Year, and the Daugh- H. ter pursues for payment of the said 6000 Merks. Against the Aliment it was Alledged, There is none due de pacto, by the Contract of Marriage, nor by Law, and the Mother must be prefumed to have Alimented her Daughter ex affectu naturali. It was Answered, That there was upon the Father, if he had been alive, a Natural Obligation to maintain his Daughter; So his Heir succeeding to his Fortune, is obliged Naturally to that same duty: And the Mother is not prefumed ex suo to Aliment her Daughter where there is a Natural Obligation lying upon an other, who has whereupon to discharge that Obligation abundantly; and though according to the usual form, the Writer has neglected in the Contract, a Clause for Alimenting the Daughter; yet feing Nature obligeth to the Thing, and there is an Estate whereupon to do it, the Judge ought to decern accordingly. To the Other part of the Libell It was Alledged, That the Term of payment of the Tocher comes not till the occasion of a Marriage offer, and the Sum returns back failzieing of her by decease without Heirs of her Body. It was Answered. That the Daughter was now Marriageable, and so long as the Money were in the power of the Uncle, it would be an impediment of Matches to her; whereas, if the Money were out of his Hands, and fecured to be furthcoming, occasions would offer, wherein the Defender has no prejudice, fince the Law will oblige him either to pay Annualrent for the Tocher or to grant an Aliment equivalent; and the Pursuer is content to find Caution to make the Money furthcoming, to fuch as it shall be found to belong to, failzieing the Pursuers Daughter.

> The Lords found the Aliment due to the Mother, and decerned the Defender to pay the Principal Sum upon Caution ut fupra.

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IN a Process betwixt Graham, Compriser of the Lands of Newark, and John Clark, and John Ross Comprisers also; There being a Comprising led Anno 1651. whereupon there is Infestment, though the Act of Parlia ad 62. Parlia fectual Comprising, to come in pari passu, being led since the first effectual Comprising, to come in pari passu, being led since the first day of January 1652. Yet, seing the Comprising led in Anno 1651. turns to the Nature of a Comprising of the Legal Reversion of the first effectual Comprising led Anno 1652. It is in the same case, as if it had been deduced immediatly thereaster.

The Lords therefore brought in that Comprising, as if it had been

deduced Anno 1662. Le Q. xci.

LXXVII. Bailie of the Regality of Glasgow, against Bogle. 28 January 1663.

In a Suspension raised at the instance of John Bogle and William Mader, against the Bailie of the Regality of Glasgow, of a Decreet, whereby the said Bailie had fined them in 100 l. for a Riot committed in the Kirk on Sunday. It was Found, That the fine was not Exorbitant in regard of the Fault; and that the Bailie of the Regality might lawfully fine for that Sum, as well as any other Judicatory what some ver.

LXXVIII. Forsyth against Morison. 31. January 1663.

By Contract of Marriage betwixt James Morison and Agnes Forsyth: He restricted is obliged to imploy 8000 Merks to them and the Bairns of the many attention of the marriage; Providing, that if it shall happen Agnes to die before her Hus-fried medical band, having no Bairns on Life, James is obliged to resound 1000 l. of her standing that Tocher to her or her Executor in Satisfaction of his Moveables; and which sure friends Provision, she for her and them, accepts in Satisfaction foresaid. Agnes Dies, having a Child, and thereaster both Child and Father Dies, and Mr. James Forsyth Brother and Executor confirmed to his Sister Agnes, pursues Achibald Morison as Executor to his Brother James, for a third of James's Moveables, there being Bairns of a former Marriage. It was Alledged, The Pursuer could not have a third, because his Sister had accepted 1000 lib. in Contentation, Sc. It was Answered, The Clause was Conditional, in case there should be no Bairns. Replied, Though

Though the words of the Condition be only in case there be should no Bairns. vet the Intention of the Parties & quo d actum est certainly has been, whether Bairns or not; because, her Interest in his Moveables, was more savourable, having no Bairns, than having Bairns; and therefore, the Clause limiting her in case of no Bairns, should multo magis limit her, having Bairns; The Sense of which Clause ought to be extended ex presumptiva voluntate contrabentium, though the words be omitted by the Writer: For which also, certain passages were adduced from the Civil Law in the Matter of nillis institutione and Substitution of Heirs Vulgar and Pupullar. Duplied, That Conditions in Contracts are stricti juris secus, in ultimis voluntatibus, that the words were clear, without Ambiguity, that the Case was favourable for the Relict's Executor, feing she was craving no more than what the Law would have given her, if the Contract had not been; That nothing could take from her the benefit of the Law, but her own express Paction, and no pretended Tacit Presumption could do it; and yet, against that Presumption it may be thought. and not improbably, that she intended less to her felf, having no Children, than having Children; Because, having Children, it may be thought, she was careful to have the larger Portion for their Proivsion. 2. It was Alledged Absolvitor for the whole, because there was a Son living after the Mother, who, if he had been confirmed Executor, her Third would have appertained to him, and confequently to his Executors the nearest of Kin on the Fathers fide: Now, that he was not confirmed Executor, was not his fault, and it ought not to prejudge his Executor, because he did what he could for the time: But then, there was no Commissariot Courts, and Instruments & Protestations were taken for him, of his willingness to confirm &c. So, that there being then a Surcease of Justice, impedimentum juris quod non neque potest provideri negemederi impedito non debet nocere. Answered, That fuch Impediments cannot hinder the ordinar course of Law, no more in Succession fion of Moveables than of Heretage: Now, though an Heir had been Served and Retoured; yea, though he had charged the Superior to Infest, yet, unless he had been actually vestitus & sastus, the Heretage does fall, as if he never had been Served; even so in Moveables, and in Confirmation of Testaments; and such an Impediment being casus fortuitus, it must have its own Hazard and Event as to the interest of Parties, but not to alter the course of Law.

The Lords Repelled both the Alledgances

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LXXIX. Laird Philorth against Lord Frazer. February 1663. damno unlerges

He deceast Sir Alexander Frazer of Philorth, dispones to Alexander Frazer 4 Shadafale of Durris in Liferent, and Robert his Son in Fie, the Lands of Cairnbulge, 5 Estheat. and others, with this express Provision, That during the Life of Philorth & old Durris together, it should not be lawful to Young Durris to dispone the Lands to any Person whatsomever, under the pain of 10000l. pro damno & interesse ex pacto convento; and if after their Death, he should be content to sell the Lands, he should make the first Offer thereof to Sir Alexander's Heir Male, or any other person he should design, bearing the Name and Arms of Frazer, for 38000 l. and in case of their Resusal, to some other person substitute successive, of whom Andrew Frazer of Staniewood was one; This Disposition by way of Contract, was dated Anno 1625. and thereupon Inhibition ferved at Sir Alexander's instance against Young Durris. Sir Alexander Asfigns his Oye Alexander Frazer now of Philorth thereto, who intents Reduction of the Right made by Young Durris to Staniewood (and in the Reduction he calls the appearand Heir of Durris and this Lord Frazer appear-4 and Heir to Staniewood) and that in so far as the samen doth concern the Clause anent the payment of the Sum of 10000 l. It was Alledged for the Defender, Absolvitor, because the Sum is Moveable, and cannot pertain to the Pursuer as Assigney, because the Defender or his Grand-father has Forbes of Right thereto from Donator to the Escheat of the faid Sir Alexander, and which Escheat is declared, and this Sum per expresum declared to belong to the Donator, Sir Alexander also Compearing. It was Answered, That the Decreet could not militat against this Pursuer on this head, That the Grand-father was debarred by Horning, and thereby impeded to propone his Defences, which could never have prejudged the Rebel himself, if he had been thereafter Relaxed; multo minus his Oye, who pursues as having Right; and if his Grand-father had been heard, he had this Defence to propone, from which he was Maliciously debared, viz. The Sum is heretable and cannot fall under the Compass of the fingle Escheat; because it is payable instuitu of an Heretable Disposition made of an Estate, and in effect as a part of the full Avail and Price pro damno & interesse; the Estate being the Ancient Fortune and Chief House of Philorth, fold far within the Avail, to Durris being of his own Name, whom Sir Alexander bound up from Difponing to any other in his own time, and who provided a Reversion to his Heir Male, if he should Dispone after his Death; and the Price being Sur-

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rogatum, est ejusdem naturæ with the Bond, and ought to belong to Philorth and his Heirs Male, just as the Lands would have done, if they had not been fold: The Contract being clear, and binding Durris not to Dispone in Philorth's time, and if he should fell after his Death, giving the Reversion to his Heir for Payment of the Sum received by Old Philorth, which was far within the Avail of the Land; and to make up the Avail, this 10000 lib: was condescended upon pro damno & interesse, in case of selling ut supra. It was Replyed, That the 10000 lib. was not a part of the Price, but pana, in case of doing a Deed prohibited, That it would have fallen to Philorth's Executors: That Philorth referved no Reversion of the Land to himself, but Disponed the samen irredeemably, only under a prohibitorie Clause, not to fell it to another, which, of the Law is reprobat. Duplyed ut supra, and that the Sum, if Philorth had Died, having Right, would have belonged to his Heir Male, to whom the Estate should have appertained, and in whose Favours a Reversion was conceived, ut Supra, and not to his Executors. And fuch Clauses conceived upon so reasonable and just Considerations, are by no Law reprobat: Much more was said pro & contra in præsentia.

The Lords found the Sum moveable, me, & multis alis contradicen-

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3 19 novambia in LixXXX. The Lady Carnagie against Lord Cranburn, February, 1663.

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is Toberofootof He Lady Carnagie, eldest Daughter and Heir of Provision to William Duke of Hamilton, and having Right to an Infestment and Gift of Recognition of the Barrony of Innerweik, pursues a Declarator, against the Lord Cranburn, to Whom the Earl of Dirleton his Grand-father had given an Infestment, to be holden of the Prince not Confirmed, the Lands being Taxt-WairdLands. It was Aldefenceledged, 1. Recognition has only place in feudo recto & proprio, viz: Simple Waird, whereas a Taxt Waird is of the nature of a Feu. 2 do. In Recognitions. probabilis ignorantia, & error excusat a pæna & damno. The Earl of Dirleton had probable Reason to think that there was no hazard: And certainly, he was far from the thought of any Contempt of his Superior, to whom he owed his Honour and Fortune; and this Error is Excufable, being such a one as most of Lawyers might have fallen into. 3tio. Contempt cannot be alledged in this Case, where the Lands are Disponed to be holden of the Superior, which fignifies clearly his Mind, that he was to feek the Superior's Confent, and that without it the Infeftment should be Null. 4to. Such an Infeftment is Null before Confirmation, and therefore can operat neither Good nor E-

vil. 5to. The Seasine is given, not by a Warrand from Cranburn, but by an Atturney out of the Chancellary, which Cranburn dislowns, and whereof also, he has a Reduction depending upon Minority. 6to. Dirleton's Insestment is given to Heirs and Assigneys, which consequently gives him Power to Dispone quibus vult. Answered, To the First, Taxt Waird and simple Waird Answer differs not, except only that Taxt-Waird values the Marriage, and dispones the Rent during Minority, at a Rate as if they were fet at that Rate. The Reddendo bears always servitia debita & consueta, &c. 2do. Iguorantia Furis non excusat. And if this were, then there never was nor could be any Recognition in the World. To the Third, Neglect of that Duty which the Vasial owes to his English, which is, before Tradition by Seasine, to feek and obtain his Confent, inferrs Recognition. And the taking of Seafine by Anticipation, makes a Contempt. To the Fourth, The Vassal, Granter of the Infeftment, cannot obtrude the Nullity of it, nor can the Receiver, nor is it Null ad omnem effectum; for by it, the Receiver inducitur in Posteries sessionem, and may possess without the Superiors Consent; by it, he may pursue the Tenents for Mails and Duties, &e. By it, the Vasial facit quod in se est to obtrude an other Vassal to the Superior: And it is not as an unregistrat Seasine; because the Vassal, and the Receiver of the Alienation, by fuffering the Seasine to be unregistrat, they declare their Mind, that the Receiver is not validly feafed till they obtain the Superior's Confent; whereas a Seasine Registrat upon a Charter holden of the Superior, wants no Solemnity; it is not in it felf Null, but only till the Charter be Confirmed. altho it be in many Cases inestectual. To the 5th, though the Seasine had been given to an Infant, and without an Atturney; yet feeing the Vassal delivers the Precept of Seafine, that Seafin may follow, his Deed and Fault making Recognition, and not the Deed of the Receivers, who as to his Interest, is in the same Case, as if the Deed had not been made to him; and yet the doing of it by the Vasial making him to Forefault his Interest, and making the Right of the Estate return to the Superior. To the 6th, Heirs the significant and Assigneys import no more against the Superior, but that it may be sevens Lawful to the Vassal, to dispone or assign his Right, doing the same al- word assign ways legally & debito modo, which is, with the Superiors Consent. 2 do. The Word Assigneys is not to be extended, nor can it carry that Liberty, which is Alledged against the Law of Waird-holdings, unless it had been per expressum so declared by the Superior, whereas the Word will, and doth otherways allow an Interpretation convenient to, and not destructive of the Law, viz: That the Vassal may assign the Rents of his Lands, not only for Years bygone, but for many Years to come, may

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fett Tacks and Rentals thereof, even without the Master's Consent. And the Word Assignation properly and commonly taken, doth not signifie an Alienation of Lands with Seasine or Tradition following thereupon, which ordinarly is in the Words, Dare, Concedere, Alienare, Disponere, not Assignare, which is ordinarly used in Sums of Money, Tacks, Rentals, and Writs or Rights of Lands, not of Lands themselves. 3tio. It is the Stilus of Writers to say, Haredibus & Assignatis; which especially in Cartis regis cannot prejudge the Superior; the King cannot be said to dispone such a considerable Interest of Superiority, except he do it expressly; and if there were any thing in it, yet being the Fault of the Officers of State, to suffer such a thing to pass, it cannot prejudge his Majesty.

Many Arguments were adduced pro & contra from the Feudal Law and Civil Law, Custom, and Craig de feudis; which the Lords having fully heared in præsentia, and carefully considered, they Repelled the whole Alledgances, nor did they regard that the Insestment was given by Dirleton to his own Oye, because he was not alioquin Successurus.

In præsentia.

LXXXI. The Laird of Foord against Wolfe, June, 1663.

* Eorge Home of Foord obtains Decreet against Mr. Thomas Wolfe for poind-I ing the Ground of his Lands of Wedderly, for an Annualrent of 100 Merks contained in an Infeftment granted to Foord's Father by Mr. Thomas's Father. This Decreet is craved to be reduced upon divers Reasons, namely that the Ground could not be Poinded for the said 100 Merks, because the Charter whereupon the Decreet is founded, is relative to a Contract; which Contract if it were produced, would bear that Annualrent to be Redeemable for 1000 Merks, according to the Case and Custom for the time; and which Contract Foord ought either to be ordained to produce, otherways the Lords ought, in Justice, to restrict the Annualrent, according to the Act of Parliament; specially considering the many pregnant Presumptions adduced in the Case; which, though they be not so great Evidences, as that the Lords could thereby judge the Principal Sum satisfied, and the Inseltments renounced, in regard of the Existence of the Charter and Seasine; yet they are such, that unless the Contract be produced by Foord, the Lords may very justly restrict the Annualrent; the Presumptions were the Date of the Infestment in Anno 1616, whereupon never any thing had followed, but only a Process intented to interrupt Prescription, and a Decreet recover-

ed after 50 Years time, the Contract not Extant, which seems to have been destroyed when the Money has been payed, and the Charter and Seasine neglected to be retired and delivered: Foord's Father in Anno 1624, received another Right of Annualrent for 3000 Merks not relative to the Prior Infeftment for 1000 Merks; wherein it may be thought, that 1000 Merks, was included, it not being referved; and which 3000 Merks was also satisfied without any Refervation: Likeas Foord's Father having acquired his Estate of Foord, never sought nor questioned the said Right which was Prior; and he having made a Disposition of his haill Estate to his Son, this Foord, including all his Lands, Moveables and others belonging to him, he did not therein mention this Annualrent: And the Disposition made to this Foord the Second Son, was done, in regard the Eldest Son yet living was a Person unfit for Government, and such a one, as was fit for nothing but for an Aliment. And this Foord, after so long a time falling upon this Charter and Seafine, caused this weak Elder Brother Dispone a Right thereof to him as Heir to his Father, and did obtain himself Decerned and Confirmed Executor, for establishing an Interest to the bygone Annualrent.

These pregnant Presumptions, and the whole Merits of the Cause being confidered, the Lords (though in Law they thought the Infeftment could not be taken away as to the Annualrents bygone and in time coming; yet they) thought that they might restrict the Annualrent, unless Foord would produce the Contract, which was the ground of the Infeftment, that it might be known whether the Annualrent was Redeemable for a Principal Sum or not. And on the contrary, It was Answered and suggested, that seeing the Lords could not take away the Infeftment, it behoved to fland in terminis, notwithstanding the Contract was wanting, which being a mutual Evident, the Granter was obliged to produce the famen, if he founded any thing thereupon. But these many Presumptions, and the Contract being wanting, and not produced by Foord as well as the Charter and Seafine, after so long a time, moved the Lords to restrict the An-

nualrent. lee D. xxxi. In præsentia.

LXXXII. Spruet against Brown and Blaw. June 1663. Trench Buying from natiby

Y a Charter Partie at Stockholm, betwixt Andrew Brown and James Brown in mercal in Culross, the said James grants the Receipt of certain Commodities belonging to Andrew, which James is obliged to Transport to Scotland

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for Andrews use; these Goods being alledged to be in the Possession of William Brown Brother to the said James, and Robert Blaw in Culross, and to be intrometted with and disponed upon by them; they are conveened by the faid Andrew Spruel for the Prices. It was Alledged for the Defenders. That they had Right to the Goods from James Brown for an Onerous Cause. in so far as, the Deiender did imploy & intrust the said James with a considerable Stock for Stockholm, to bring home with the return thereof fuch Commodities as he could best Bargain for. He accordingly did bring home the Goods lybelled, and delivered them to the Defenders as the return of their Stock, neither did they know, or were obliged to know any Bargain betwixt the faid James and the Pursuer. It was Answered, That the Pursuer had rei Vindicationem against any who medled with his Goods, the Goods Tybelled being properly his own, and he was in the same Condition, as if the Defenders had bought the Goods in a Mercat a non Domino; and the faid Fames not being Owner, but trusted by the Pursuer, the Defenders It was Replied, That James beshould seek their Warrandice of James. ing imployed ut supra, and having returned and delivered the saids Goods in lieu of their Stock, they might lawfully and effectually intromett therewith as their own, and were not in the case of Persons buying in Mercats in Scotland, who are obliged to take Caution for their Warrandice, otherways they buy upon their own Perill; but they are in the Condition of Per- had Tons who buys from a Merchants Servant or Factor, who coming out of Forreign Countreys fells Commodities to Merchants at home, who are not obliged to examine whether the Goods be the Sellers or not, they buying and receiving them bona fide; Nor is any Man buying Goods out of a Shop, obliged to enquire whether the Shop-keepers have good Right to them or not; but if any pretend Right to the Goods fold, he ought to pursue the Seller and not the Receiver.

The Lords before Answer, ordained the Defenders to condescend and prove what Goods they sent over Seas with the said James, and upon what Terms; But they inclined to Judge, that if it were proven, that they fent them away with Commodities, for a Return to be brought home, and that accordingly the Goods lybelled were Returned and

Delivered, they would Affoilzie the Defenders.

Consent prosumble LXXXII. Stewart against Stewart. June 1653.

Inian Stewart of Ascog, as Heir to John his Father, pursues the Reduction on of a Right made by him to John Stewart of Arnhome, as being

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done on Death-bed. It was Alledged by the Defender, That he should be Affoilzied, because the Pursuer is Witness to the Right in Question. It was Answered, That he was only Witness to the Subscription, and not to the Deed it felf, and was not obliged to know the Tenor of it. It was Replied, That he being then the appearand Heir, and his Father Sick and on Death-bed, as is acknowledged; he is prefumed to have known what was in the Right, at least considering his Fathers Condition, he ought to have examined the Tenor of the Write, and considered whether it was prejudicial to him or not, which if he hath neglected fibi imputet.

The Lords found the appearand Heir's Witnesling, is equivalent to a Consent, in reguard he is presumed to have known, or ought to have known the Nature of the Right, and they found a great Odds betwixt

a Son Subscribing and a Stranger not Interested.

The like found June 1666. Haliburton contra Haliburton.

LXXXIII. Hay against Corftorphine. 23 June 1663.

nocoffany to family. Here being a Decreet recovered at the instance of Euphan Hay Shop keeper in St. Andrew's, against Elisabeth Corstorphine, for certain Commodities furnished to the Defender for her House; This Decreet being recovered before the Bailies of the Regality, was brought in Question before the Lords, upon this Ground, That the Defender the time of the furnishing was cled with a Husband, and so she could not be lyable for any Debt contracted by her stante matrimonio. To which It was Answered, That by the space of 15 Years the Defender was keeper of a House and Lodged Boarders proprio nomine, there being diverse Reports for the time of herHusband's Death, in which time the particulars lybelled were furnished to her for the Use and Necessity of her Family and Boarders.

The Lords Sustained the Decreet.

LXXXIV. Wardlaw against Dalglish, Eodem die.

He deceast William Wardlaw being Debitor to Walter Dalglish in a negliging of all Sum of Money by Bond, which was conceived in favours of the Refuntion said Walter and Mary Home his Spouse in Liferent, and Christian Dalglish their Daughter in Fie, with Power nevertheless to Walter to dispone thereupon at his pleasure. Upon this Bond a Comprising is led of the Debitors Lands of Logie, in favours of the foresaids Persons ut supra, without insert-

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ing of the Liberty and Power foresaid, in savours of the said Walter, where upon they are all three Insest. Thereafter by a Sale of a part of the Comprised Lands, Walter is satisfied, and yet in his time, his Wise and Daughter are not denuded, whereupon Charles Wardlaw Son-in-law to William, pursues the Wise and the Daughter to denude themselves, in regard Walter was satisfied. It was Alledged, That they should be Assoilzied, in respect, by the Comprising Walter was only Liserenter with his Wise, and could do no Deed in prejudice of his Wise and Daughter. It was Answered, That by the Bond, he had Power to dispose upon the Money, notwithstanding of the Joint Liserent of his Wise, and the Fie in savours of his Daughter; and that Clause anent the Power of Disposal in savours of Walter, ought to be holden as Repeated in the Comprising, as in the Bond, the Bond being the Ground thereof, tho by Negligence the Clerk has omitted the samen; and Parties not being obliged to look after such Formalities, the Clerk's Negligence should not prejudge them, the Matter it self being so clear.

The Lords Repelled the Alledgance in respect of the Answer.

LXXXV. Craw against Culbertson. June 1563.

Hristian Craw obtains a Decreet before the Bailies of Edinburgh against Bessie Culbertson Relict to John Denholm Baxter, decerning her to pay 100 Merk Principal, with some Annualrents and Penalties (contained in a Bond made by her faid Defunct Husband, upon her Promife to pay the famen proven by Witnesses. This Decreet is craved to be Reduced upon this Reason, That a Promise of this Nature, is only probable scripto vel Furamento, as was found, in the Case betwixt Tillie and Innerleith 4. of March 1636. seing such Promises falling only under the Sense of Hearing, the Hearer may be mistaken of the Words of the Promise. Likeas Pollicitations. of that Nature, which are fine causa, and not being pacta vestita, are not in Law Obligatory; But so it is, that this Relict was noways obliged of her self in any fuch Debt, but her Husband only, to whom she was neither Heir nor Executrix. It was Answered, That the Promise was opposed which was made in tuitu of an Obligation lying upon her Husband, to which shedid interpose her self by Promise as ex promissor, which Paction, though nudum, yet being veftitum with her deceast Husband's Obligation, is Obligatory against her, just as if the appearand Heir should Promise to pay the Father's Debts; and this Promise being for a Debt within 100 L it is probable by Witnesses.

The Lords Assoilzied the Defender:

LXXXVI.

LXXXVI. Wilkieson against Cranstoun. June 1663. Consuched o Course

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Homas Wilkieson obtains a Decreet of Removing against Barbara Sanderson for Removing from a Burges Acre in Lawder, which was Suspended by her, and by Thomas Cranstoun in Lawder, (who was called to the giving of the said Decreet) upon this Reason, That Barbara is Tenent to the faid Thomas, who has Disposition of the faid Burges Acre from his Father, who had Right thereto from his Mother, and by vertue of the faids Rights above seven Years in Possession. Answered, Not Relevant, unless the faid Thomas or his Father were Infeft, whereas the Charger is Infeft. Replied, That any Infeftment the Charger has, is only upon an Appriling. whereupon he obtained Letters of Horning, and Compelled the Bailies of Lawder to infeft him, which being done Superabundanter cannot prejudge the Defenders Right, which is sufficient without a Seasin; because he offers himself to prove, That the constant Custom of the Town of Lauder among the Burgesses is, to Transmit their Rights to Burges Acres, by Naked Dispositions, and Acts of the Town-Court; concerning which Acres, there are diverse other Priviledges Singular, and not else-where in any other Burgh: for there being of Old Disponed by the King 100 Acres to 165. Burgelles 105. of Lauder; they were Disponed with this Quality, That there can be no more or fewer Burgesses, than there are Burgesses Acres, and no Burges can possess more than one; and they are not Transmitable to any but to a Burges who is never Infeft, but bruicks by an Act of Court with a Naked Disposition.

The Lords, before Answer, ordained the Charger to Condescend, whether the Person from whom he Comprised, was Infest or not.

a ogatam sei haveditaria LXXXVII. Kinloch against Lundie. Inly 1663. Exer logatar. Obert Lundie by his Latter-will nominates Mr. Thomas and Robert Lundies his Executors, and leaves in Legacy to Mr. Robert Kinloch, a Sum of Money due to the Defunct by Sir Robert Fletcher; for which Legacy Mr. Robert pursues his Executors. It was Alledged for the Executors, That they cannot be liable, because it is Speciale legatum, due by such a Bond, whereunto the Executors cannot have Right as Executors, because the Sum is Heretable, and so not liable to a Legacy; no more than if he had left such a thing in arca, which was not in rerum natura: In which case periculum est legatarii. To the which it was Answered, That a Legacy of

this nature, viz a Debt which is Heretable, is, as if it had been legatum rei alienæ: In which case by the Law, Hæres tenetur luere, secundum vires Inventarii: And therefore, if there be free Moveables, the Legacy should be made good.

Which the Lords found accordingly.

andice abjolute minifer glas LXXXVIII. Elphingstone against the Lord Blantyre. July 1663. Lany Cartocodent

Usleme eHe Lord Blantyre's Father having disponed to Harie Elphingstone the Kirk-lands of Caldercleir, with Absolute Warrandice. Thereafter in Anno 1642. four Acres of them were designed to the Minister, and three Acres farther in anno 1649. Whereupon Harie Elphinstone having pursued a Transferring of the Disposition against this Lord Blantyre, as Heir to his Father, he obtained Decreet, and charged thereupon; which was Sufpended upon this Reason, That the Eviction was not from the Defect of Harie Elphinstone's Right, but by a supervenient Law. The English Judges found the Letters orderly proceeded, notwithstanding of the Reason. And Blantyre having intented a Review, he refumed and enlarged the famen Reason, There can be no Warrandice in such a Case, where the Lands were taken away from Calderhall, by a Designation warranted by Act of Parliament; no more than a Disponer should warrand Lands from publick Burdens laid on by a Statute, nor that a Diffeoner should warrand them from a Decreet of Buying, or from a School-master's Stipend for a School erected after the Disposition: And therefore where this Eviction doth arife ex natura Rei, had which the Buyer should know, and not ex defectu Juris, there can be no St. Warrandice. It was Answered, That Absolute Warrandice importeth security against Inconvenients whatsoever, whereby the thing warranted is taken from the Buyer, and made to belong to another, or is burdened with former Deeds: And it is not alike, as when Publick Burdens are imposed; for these take not the Dominion of the Lands from the Buyer: Nor are they founded upon private Deeds made in favours of private Persons, but are publica overa, imposed for publick Use, and for the Good of the People, and consequently for the Buyer's own Good; and yet if any of these Burdens be owing the time of the Disposition, Absolute Warrandice will relieve the Buyer thereof; ficklike of School-masters Stipends. And as to a Decreet of buying Teinds; Esto, argumenti gratia, it were so as said is and alledged, The reason is, because the Buyer cannot pretend Prejudice, seing he by the Decreet gets the Value and Worth of the Teinds, according as.

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the Price is settled by a general Law. Likeas, before the Lands were acquired by Calderhall, there was of a very long time an Act of Parliament ordaining Kirk-lands to be liable to the Designations of Manses and Gleibs: And the Absolute Warrandice making no Exception thereof, it must carry all hazard redounding to the Buyer by the Act of Parliament then flanding.

The Lords Assoilzied from the Reason of Review as to the Four Acres of Land, in regard the Eviction was by no supervenient Law. But as to the Three Acres, in regard the Eviction was by a supervenient Law in anno 1649, they declared they would hear the Parties.

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LXXXIX. Beg against Brown. July 1663.

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N a Process betwixt John Beg and Antonia Brown, the Lords found, That a Bond of Corroboration is a sufficient Title to aclaim the Debt, tho' action the Principal Bond be lost or a-missing; unless it were alledged, That the Principal Bond is fatisfied.

XC. Forbes against the Town of Inverness.

N a Process for abstracted Multures, betwixt John Forbes of Colloden and ren had the Inhabitants of Invernes; It was alledged, That invetta & illata cannot for the be extended to such Corns as are bought by Merchants, and are made Malt of within the Town, and thereafter transported over Seas to Burren and else-where; seing the Pursuer nor his Authors were never in possession of Multure for fuch Corns: And it were a prejudice to Trade and Exportation, if such a thing should be sustained. It was Answered, That investa & illata is and ought to be extended to all Corns that tholes Fire and Water within the Thirlage, whitherfoever the Victual be transported. And the reason why the Pursuer has not been in Possession, is because, till of late. there was no Trade that way. Likeas, Victual till this Parliament, was a forbidden Commodity, and now in the Cases mentioned in the Act, there being allowance of Transportation; there is als great Reason to pay Multure for fuch Corns as are Transported over-Seas, as for such as may be Transported to any other Haven in Scotland.

Which accordingly the Lords found, and therefore Repelled the Alledgance. In præsentia.

Decided also de novo in the Winter Sellicn.

Burgh

empiring for sums secured by

infoffment in an @rent-

XCI. Graham against Clark. July 1663.

Nthe foresaid Process betwixt Graham and Clark in January last. The Lords found, That a Comprising being led for Sums of Money, where-upon an Insestment of Annualrent was granted; the Compriser might pass from his Comprising, and return to his Insestment of Annualrent. This conform to Practiques long since dicided.

ent. XCII. Town of Inverness against Forbes. November 1663.

ajusto Der THe Town of Inverness having Stented John Forbes of Colloden in a certain Sum, with the rest of the Burgesses, for his Burrow-Lands, within and without Burgh, holden Burgage. He being Charged, Suspends upon this Reason among others, That the Stent was unjustly imposed, not only as to the Proportion, the Suspender being burdened far above the Rate of his Estate; but also in regard, the Stent was imposed for defraying some particulars, and paying some debts unwarrantably Contracted, and for which the Inhabitants and Burgesses cannot be lyable, not having given any Consent thereto. Likeas, the Common-Good of the Burgh being the proper Subject, out of which the Burgh's Burdens should be satisfied, the same is mis-spended by the Magistrats, who would always take this Course to Burden the Inhabitants, for defraying of Burdens contracted by their own Milgovernment. And yet the Suspender of his own Consent, was Content to Satisfie what is now imposed upon him, there being a Rule and Order determined for the Future, how the Inhabitants, especially the Suspender, may not be Oppressed with such Stents. It was Answered, That the Stent was imposed by sworn Men, appointed by the Town Council, who found the cause of the Stent Just. Replied, That the Magistrats can impose no Stent upon the Inhabitants without their own Consent, and Calling them for that effect, unless for such Taxes as are appointed, and put upon Burghs by Law.

The Lords found the Suspender lyable in payment of the Stent now imposed, for which he is Charged; and that not only as to his Lands within Burgh, but also as to those Lands which holds Feu of the Town in respect of his Charter, whereby the Lands therein specified are Feured to him, his Heirs and Assigneys, they being Burgesses of the Burgh; and therefore finds the Letters raised at the Chargers instance against

him

him orderly proceeded. And Finds and Declares, That in time-coming, before any Stent or Taxation be imposed by the Town-Council, That there ought to be publick Intimation made thereof to the whole Burgesles and Inhabitants of the Town, by ringing of a Bell, or touck of a Drum; and they being Conveened, the Just and Necessar Cause of the Stent ought to be fignified to them, and that the Common-Good is not able to defray the same, being otherways exhausted; and for that effect, That the Town's Books be made patent, that thereby it may appear how the Common-Good is imployed; and that the Stent-Masters are to elected by the Town-Council, but their Names to be Intimat to the whole Burgesses and Neighbours, that they may be heard to propone any Just Exception against them; and that the Stent-Roll be made known to all, that every one may know his proportion thereof.

XCIII. Countess of Oxford against the Viscount thereof. 13 February 1664. afterdely y.

THe Viscountess of Oxford pursues the Tenents of the Mains of Cranstown McGill for payment of the Duties: Compearance is made for the Vifcount her Son, who Alledges, No Process upon the Pursuer's Seasine, because it is but the Assertion of a Nottar. And as to the Charter, which is the Ground thereof, it is for no Onerous Cause, but a meer Donation betwixt Man and Wife, which her Husband might Revoke, and did Revoke by cancelling his Subscription from it. Likeas, the Charter was never delivered, but kept by him till he cancelled it. It was Answered, That the foresaid Right is not a meer Donation; but after her Husband was Married to the Young Noble Lady, having received a Competent Tocher; and only provided her out of his great Fortune, to 2500 Merks yearly, she fell, by decease of her Brother Killyth, to 8000 Merks, which her Husband got: And though the Charter did not relate thereto; yet it was dated after, and must be interpret Donatio Remuneratoria, of that which he lucratus erat by that Accretion: Neither can the Cancelling thereof, or the Not-delivery, be obtruded; because the Charter being made persect by a Seasine, and her Husband's Bailie, Haver of the Charter, having given to her Acturney Tradition and Possession by Earth and Stane, the Charter became then her Evident, and could not be Cancelled to her prejudice. To this, the Charter was opponed, bearing only for Love and Favour; and by her Contract of Marriage she did assign to her Husband what should befal to her by the Death

Death of her Brother: And the Provision therein-mentioned, was nevertheless in contentation of all the could acclaim, unless what he pleased to bestow upon her.

The Lords Repelled the Alledgance and Reply in respect of the Answer; and found the Right Remuneratory, notwithstanding the Contract, wherein they did consider the Meanness of her Provision, and the Plentifulness of her Son's Fortune, as a great Motive of the Decision. Me tamen renitente. In præsentia.

Herr apparent hereditus jacons.

XCIV. Weir against Drummond.

Rabile may IN a Process betwixt Mr. William Weir Servitor to the King's Advocate, against Mr. Henry Drummond of Balloch and his Tenents; against which Tenents Mr. William had obtained a Decreet to make their Duties furthcoming, as Arrested in their Hands, and belonging to the deceast Drummond of Balloch, who was cited. It was alledged by Balloch, That the Decreet could not be respected, being for Duties not belonging to the Defunct, feing he was never Infest as Heir to his Father, and confequently the Duties of all Years fince his Father's Death do appertain to him. was Answered, That the Defunct being appearand Heir, as the Tenents might fafely pay their Duties to him, though he were not Infeft; fo his Creditor might lawfully Arrest the Duties so payable? For albeit an appearand Heir cannot purfue an Action of Mails and Duties; yet the Tenent may lawfully pay him: Yea; and if the Tenent hath once acknowledged him by payment, he may pursue without an Infestment. Nor is there any o- arhon ther habilis modus for the appearand Heir's Creditors to affect the by-run Duties, but by Arrestment; for neither Comprising nor Adjudication, which are the Ground of Infeftments, can carry Duties owing before they be deduced; and confequently the only proper way to affect the fame, is by Arrestment, whether it be for the appearand Heir's Debt, or for the Debt of the Defunct to whom he is appearand Heir; whereupon a Charge to enter Heir being raised, and an Arrestment thereupon used, That Arrestment after Sentence, (the appearand Heir getting Condemnator, or Absolvitor upon a Renunciation to be Heir) will be a ground to make the Duties furth-coming. nor use opposed, bearing only for Love

Which the Lords found accordingly, and or ngula bib all against to

XCV.

XCV. Chyne against Keith.

Probation Promiso

Here was a Decreet obtained before the Commissar of Aberdeen, at the instance of Mr. Thomas Chyne as Executor to Mr. John Chyne his Father, against James Keith of Kinnady, as representing his Father, for payment of 100 Merks as the Price of a Horse, promised by the Defenders Father to the Pursuers Father; in regard of an Agreement profitably made in an Action of Spuilzie pursued by the said Mr. John Chyne against Kinnadies Father, which promife was proven by Witnesses. This Decreet was craved to be reduced upon this Reason, That the promise was not probable by Witnesses, especially after 17 or 18 years time both Parties being now dead. and they having lived together above 10 years; and repeated a practique out of Durie 25 March 1629 betwixt Russel and Paterson, where the Lords refused to sustain a promise of Ninty Nine Pound, to be proven but by Write or Oath of Party. It was Answered, This promise being for an Onerous cause, and for a thing of a little moment, which prescrived not, was probable by Witnesses, and quocunque tempore might be craved. fee D. Ixxv. This mender as to profesiption by act. Part. 1669.

The Lords reduced the Decreet.

XCVI. Russel against Cuninghame.

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Awrence Russel pursues George Cunninghame, for making a Debt forth-coming as Arrested in his hands, whereof he was Debitor to Hary Mosfat; and being referred to the Desenders Oath, he swears and is assoilzied, Mosfat being called in the Process Thereaster, there is a new Process pursued before the Lords, at Mosfats instance against Cuninghame, who Alledges, That resest hastenus judicata upon his Oath, Mosfat being called. It was Answered, That Mosfat was not compearing, nor Pursuer of that Process. Replyed, His Creditor Arrester was Pursuer, compearing, and he himself called; whom the Desender could not force to compear, and he himself forced to give his Oath, otherways to be holden as consest; and Oaths so taken, end the Controversy without recovery.

The Lords Assoilzied, yet they inclined to cause Re-examine Cuninghame; if it could be made appear, that there was any unclearness in the Oath.

XCVIL

The Decisions of the Lords

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XCVII. Hodge against Brown.

R. Robert Hodge pursues Robert Brown Merchant for certain Duties of Land in Leith, possest by the Desender belonging to the Purtain profitable Expenses, wared out by him upon the House. It was Answered, That the Desender possess the House as succeeding in the vice and place of Andrew Brysson, to whom the Pursuer by Tack sett the Houses for a Duty simply, without respect to any Charges to be wared out by the Tacksman: So that what the Tacksman Built or Repaired, it was on his own Hazard and Charge, there being nothing conditioned therefore. It was Replied, That the Desender was only conveened as Possessor, and as Possessor, he ought to have Allowance of what he profitably bestowed. It was Duplied, That what he bestowed without Warrand of the Master, and being in Vice of the Tacksman, he can be in no better case than the Tacksman, who, during his Tack, if he had builded never so much, would have accresced to the Heretor, without Remedy or Recovery of the Expenses.

The Lords found no Allowance should be granted.

In this same Process, It was alledged, The Desender ought to have Compensation for such Debts as were owing to him by the said Andrew Brysson, Setter of the Houses to him. It was Answered, That the Pursuer being Heretor and Master, ought to have his Duty sully payed to him, without respect to any Debt owing to the Desender by Brysson. It was Replied, That the Tacksman being the Setter of the Houses to the Desender, he was the Desender's Master, to whom if the Desender had made formal payment, he would have been Assolized: Now Compensation is Payment by the Law, or the equivalent.

The Lords allowed Compensation, the Debt being proven.

XCVIII. Earl of Errol against Mouat.

Dispones the Teinds of the Barrony of Balquholly to Sir George Mouat

Heretor thereof; and in the Disposition and the Dispositive Words, the Barrony of Balquholly is set down, but with this addition, Comprehending the particular Roms, &c. therein enumerat: And amongst the Rooms there is

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fet down the Teinds of the Lands of Bomelly, which Lands did never belong to Sir George; and notwithstanding of the Disposition, the Teinds of Bomel. by were still possest by the Heretor the Earl, and the Lands having been posfest by Sir John Urguhart and his Predecessors these 100 or 80 Years. Whereupon the Earl pursues a Declarator against Sir George and Magnus Mouat, to whom he had disponed the foresaid Barrony, with the Teinds mentioned in the foresaid Right; To hear and see it found, That the Teinds of the Barrony only were disponed, and that Bomelly being only by Error falfly defigned as a part of the Barrony, whereof it was no part; That therefore the Teinds of Bomelly, ought no ways to be holden as disponed by the Earl. It was Alledged by the said Magnus, That he having acquired the Teinds bona fide from Sir George, he ought to enjoy them according to the Defignation and Enumeration. It was Answered, That falsa designatio nihil operatur: and the Subject-matter affigned being only the Teinds of the Barrony, the Word Comprehending, is only Exegetick and Demonstrative; which Demonstration being clearly Erroneous, contrair to the Meaning of the Bargain, it cannot prejudge the Disponer. Likeas, it was offered to be proven by the Communers that made the Bargain, that no more was Communed upon, but the Teinds of the Barrony, being Sir George's own Lands: For if the particular Enumeration had not fully comprehended the whole Rooms, but that some one had been omitted; yet if the Subject-matter had been clear, of the Teinds of the whole Barrony in question; Sir George could not have been prejudged; even so when a Room is erroneously designed, quia plus valet quod agitur, quam quod per errorem concipitur. And to evidence it was but a clear Error, Sir George was never in possession, nor did he ever claim the Teinds, though the Disposition was made Anno 1656.

The Lords Repelled the Alledgance, in respect of the Libel and

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XCIX. Bruce against Morison.

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Sir George Morison of Dairsey made an Assignation to umquhile Mr. Robert Bruce of Broomball, to a Sum of Money, contained in a Bond granted to him by the Earl of Seasorth, Lord Sinclair, Lairds of Murkle, Lugtoum and Blackburn: Which Assignation he did oblige himself to Warrand at all Hands, and that he should recover thankful payment of the Sums assigned, otherways that he should pay to him what Sums he should not recover from the Debitors, Alexander Bruce Son and Heir of Mr. Robert, pursues

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Registration of this Assignation against Sir George, to the end he may have Execution against him for Warrandice and Payment, Payment not being recovered from the Debitors. It was Alledged, Absolvitor, because the Assignation being dated Anno 1647, the Clause of Warrandice and Repayment could import no such thing as Repayment, unless Diligence had been done debito tempore against the Debitors; who if they have now become irresponsal it should only prejudge the Pursuer being his own and his Fathers mora and not the Defenders. It was Answered, That in the Assignation, it was not provided that the receiver should do Diligence, but that he should recover timous payment; but so it is that he did not recover timeous payment: Likeas after the granting the Assignation, the troubles of the Countrey having grown, and sinsyne the Pursuer having used Diligence against the Lord Sinclair by Horning, Caption, &c, he has done more then he was obliged to do: He not being tyed to Diligence by the Assignation.

The Lords repelled the Alledgance.

C. Thomson against Reid June 1664.

Raus Thomson Compriseth from James Sinclair Merchant in Edinburgh certain Tenements, and obtains Decreet of Mails and Duties against had the Tenents, and namely against James Reid Gardner, who Suspends and intents Action of Reduction upon this Reason, That he hath from the Comprifers Author a Tack for certain Terms to run, in which Tack he is obliged to pay a Tack Duty, and of which Tack Duty he has Retention are tante for the Annualrent of 600 Merks owing by the Comprisers Author to him, conform to the Tack. To which it was Answered, That whatever Declaration is contained in the Tack anent the Retention, it cannot operate against a singular Successor, and can only work against the Setter so long as he is not denuded: For which some practiques were alledged. Re-St plied. That the Tack is Anterior to the Pursuers Right and cled with Possesson, and that the Defender might have procured a Tack for a Penny year-Ty, which would have defended him against any posterior Compriser being bona fide purchased, and consequently he might as lawfully purchase a Tack containing the faid Declaration, the Tack otherways having all the Sotempities and Substantials of a Tack, viz. Entry, Ish and Duty: And as to the Practiques, none of them do meet,

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mnovation.

The Lords found the reason of Suspension Relevant and no ways to meet the Practiques, for they sound the Declaration real and to be more valid than if the Tacksiman had had a Bond obliging the Setter to allow the Tack Duty pro tanto in payment of the Annual-rent, the Declaration being subjoyned to the Clause for payment of the Tack Duty, and equivalent as if there had been a Clause allowing in the fore-end of the Tack Duty such charges as he should ware out in Repairing the House.

CI. Kae against Stewart.

T Ames Kae being obliged to pay to William Kae his Brother, 5100 Merks by Bond 1622, and William having raised a Process of transferring against James Kae Son to his Brother James, he serves Inhibition upon the dependance in Anno 1641, and in Anno 1643 obtains Decreet of transferring: Thereafter in Anno 1650, there being a Submission betwixt the Parties, Decreet Arbitral is pronunced, by which the faid James is Decerned to pay to the faid William the Sum of 2000 Merks in full fatisfaction and compleat payment of the said 5100 Merks and haill Annualrents thereof, and William is decerned to Discharge the samen, with the Bond and all that has followed thereupon; upon which Decreet Arbitral William ferves Inhibition also, and upon both first and second Inhibitions he intents Reduction of certain Bonds and Deeds done by the Father James, not only before but after the Decreet Arbitral. Against which, It was Alledged for the Defenders, That they ought to be Assoilzied in so far as concerns deeds done before the Decreet Arbitral, because the first Bond and Inhibition is innovat by the Submission and Decreet Arbitral, by which 2000 Merks is decerned to be payed in satisfaction and compleat payment thereof, and William ordained to Discharge samen. It was Answered, That the Sum not being payed, and the Discharge not being granted, his prior Right should stand, till he be fatisfied by the Decreet Arbitral. Replyed, The prior Bond and Inhibition is fatisfied by the Decreet Arbitral, which is made use of and Homologate by William, by having raised a new Inhibition thereupon, which can only furnish Action of Reduction of Deeds made after the same.

Which accordingly the Lords found after serious consideration of the Decreet Arbitral, and the whole Debate thereupon.

Heretable CIL Earl of Marr against Hamiltoun 15 of June 1664.

Bond being granted before the Act of Parliament 1641, by the Deceast Earl of Marr, to the Deceast John Hamiltoun of Clatto bearing Annualrent; and this Earl having granted a Bond of Corroboration in Anno 1642, bearing Annualrent also.

The Lords found, that the Bond of Corroboration belongs to the Heir, as accessory to the Principal Bond which is Heretable; and the Executors also concurred.

Jack of land w wood autopro Cill. Laird of Touch against Ferguson 16 June 1664.

That he had a Tack of some Lands belonging to Touch with Woods, Glens, Pasturage for Five Nineteen Years, to be possest as Ferguson his Father formerly possest the samen: But so it is, that his Father did Cutt. It was Answered, That though the Tack was set with Woods, &c. yet that gives only power to Cut for repairing the Houses, or building upon the ground, but not to Cutt and Dispone. Likeas, the Pursuer offered to prove, that so oft as the Desender, or his Father, Cutted and Disponed to his Masters knowledge, he stoped and unlawed them in his Courts therefore.

The Lords repelled the Alledgeance.

stipend wille in august. Minister of Mannour against Parochiners 21 June 1664.

IN a Suspension betwixt Mr. John Hay Minister of Mannour & the Parochiners. It was found, that he being presented and admitted in the Month of August, has only Right to the half Years Stipend that Year, and the other half to be Vacand.

Gennente Sublenent. The Laird of Touch against Ferguson 23 June 1664.

Brother Fohn, the one of them being Sub-tenent to the other, he was unlawed at several times, for not coming to Touch's Courts being warned from thereto; the unlaw toties quoties was 5 lib. and in whole extended to more

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then 60 lib. It was Alledged, That he being only a Sub-tenent, without a Tack is not obliged to compear at the Court, unless he were cited at the instance of a Party by a Complaint or Process; and tho he were obliged to compear, yet to cite him so often and to unlaw him so high, is against Justice. It was Answered, That Touch lying on the Border of the Highlands, he was necessitate frequently to hold Courts, for causeing the Tenents do such service, for sencing the Lands against the insalling of the Highlanders and their Goods, as they have in former times been in use to do, and the unlaw is not exorbitant.

The Lords sustained the Acts of Court, but modified the 5 lib. of unlaw to 40 s.

CVI. Lyon against Bannerman, June 21 1664.

Here is an Action pursued at the instance of John Lyon of Muresk gainst Bannerman of Elfick, as Successor titulo lucrativo, to his Father, hine of other in the Lands of Elfick and others, for Payment of a Debt owing by his Fa-matton ther, before his Right. It was alledged, That the Right he had from his Father was Onerous, viz: his Contract of Marriage, by which for 10000 Merks received by the Father, of his Sons Tochar, and for certain other burdens wherewith his Father had Power to burden the Lands; his Father did Dispone the Estate to him. To which, it was Answered, That the Tochar and Burdens forefaid were not equivalent to the Worth of the Lands. so that for the Superplus the Defender was Successor titulo lucrativo. It was Replyed, That the Title being onerous, tho there might be a Superplus of the Worth, that could not make him Successor by a Lucrative Title; But all that it could work, is, That the Lands might be redeemable from the Defender for the Tocher payed, and other Burdens truely undertaken as betwixt Weems of Lothocker and his Fathers Crewas found in Anno ditors, at the Least that the Lands should be really lyable for the said Superplus.

Which accordingly the Lords found; and Parties being der novo heard, they Adher'd to their Former Interlocutor, with this Addition, That the Superplus foresaid, as the same might be Estimat the time of the Contract should not only be lyable to the Creditors after Compt; but also for the Annualrent thereof, after the intenting of the Respective Creditors their Cause.

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2 Corporation CVII. Hammer-men of Edinburgh against Stewart, 24 June, 1664.

He Hammermen of Edinburgh in Anno 1641, obtain from the King a Gift of Mortification of certain Feu Duties belonging to the Bishoprick What of Dunkeld; and thereupon having Charged Sir William Stewart of Innernytie, Julie for Payment of a Feu-Duty for certain by-run Years resting before the Restitution of the Bishops, he Suspended upon this Reason, That there being certain Feu-Duties resting by old Garntilly the Suspender's Father, for which the Suspender was Charged as Executor to his Father, he did truely pay the famen, and not only obtain a Discharge thereof, but also of the samen Feu-not. Duties yearly in time coming; which Discharge was Subscribed by the Dea- 54 con, Box-master, and their Factor. It was Answered, That the Discharge could not be respected, as to any further years then was truly satisfied; because it being a Mortification to the use of poor Beed-men, the Subscribers of the Discharge had no power to Subscribe the same without true and real payment made thereof, unless they had an express Warrand from the Beedmen and whole Craft; and that an answerable satisfaction should have been made therefore: Nor could they give a Discharge of future Years, their Charge being only Annual as Deacon and Box-mafter. Replied, The Discharge was opponed, and that the Beed-men should feek their relief off the Craft, whose Deacon and Box-master have power to uplift any thing belonging to the Incorporation.

> The Lords found the Answer to the Reason of Suspension Relevant, and did only sustain the Discharge for the Years truly satisfied: And found, That the Clause for the future was either adjected by Error, or by Fraud; which could not prejudge the Beed-men nor the Incorporation, unless there had been an express Warrand for it,

upon a Just and Onerous Ground.

Farquharson against Gardner 24 June 1664

Here being a Decreet of wrongous intromission recovered at the instance of Farquhar son against Gardner and others, Indemnily for divers Goods alledged spuilzied the time of the Troubles: Reduction Inst. was intented thereof, upon a reason sounded upon the Act of Indemnity. which it was Answered, That the Act of Indemnity can defend none who spuilzied Goods, without an Order from some Superior Officer; and

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thir Pursuers of this Reduction cannot alledge any such Order. It was Replied, That the Pursuers being Souldiers under Command for the time, must be presumed to have meddled with the Goods by an Order; especially, seing they offered to prove, that they were under the Command of the Master of Forbes, who keeped a Garison in the North, for whose use they medled with the Goods; and after so many Years, 17 or 18, they cannot be oblig'd to prove an Order; Orders at that time, being for the most part Verbal.

The Lords sustained the Reason of Reduction, unless the Desender would offer to prove by the Pursuers Oath, That what he did anent

the taking away the Goods, they did it without Order.

CIX. Black against Moffat. 28 June 1664. asignation of a

in warvandice is not fripu-Here was a Bargain betwixt Andrew Black and William Moffat, whereby the the faid William fold to the faid Andrew certain peices of Cloath, at a certain Price; And for Payment thereof pro tanto, Andrew was to affign to William a Bond of 300 M owing by James Inglis; whereupon William pursued the faid Andrew, for fulfilling the Bargain, and obtain'd Decreet before the Bailies of Edinburgh; which Decreet being questioned before the Lords, the Debate was, whether the said Andrew should assign the foresaid Bond with absolute Warrandice, that the Assignation might effectually work payment. It was Alledged, That he should only Assign with Warrandice from his own Fact and Deed; because, it being in the Bargain, that he should only affign the Specifick Debt, not mentioning any Warrandice at all: It imports no more, but that he should not be oblig'd to pay Money, but to give him fuch a Debitor, against whom, if Exception had been made, he would not have made the Bargain. It was Answered, That Andrew having agreed to grant an Assignation, it ought to be an Effectual one, and not of a Debitor who possibly would prove irresponsal; and that therefore the said Andrew should be obliged for his Sufficiency.

The Lords found, that William should be free of the Bargain, unless he got an Assignation with absolute Warrandice, but would not tie the said Andrew to it, if he would rather quite the Bargain.

CX. Crawfurd against the Laird of Prestoungrange. I July 1664. mones THE Earl of Traquair being Tacksman of the Teinds of the Paroch of In- Lay stury.

nerlethem, and having Assigned the valued Duty of the Viccarrage of

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the Lands of Lethenhops to Thomas Crawfurd Merchant, he pursues the Laird of Prestoungrange Heretor for payment of the valued Duty. Alledged, That the Lands of Lethenhops were of Old a part of the Abbacy of Newbattle, erected in a Temporality in favours of Mark, thereafter, Earl of Louthian, from whom Prestoungrange has Right by Progress, to the said Lands & to the Teinds, to be possessed by him, as of Old. Likeas, there is a Protestation for him in the Decreet of Valuation, that it should not be Prejudicial to his Right, when soever the Lands should be plenished with his own Goods, not fet to Tenents, at which time no Teind is payable therefore, which by the Cannon Law, was a priviledge granted to the Monks of the Ciftertian Order, whereof Newbattle was an Abbacy. Likeas, The Abbots constit tainually enjoyed that Priviledge; and fincefyne, the Lords of Erection. and the Defender and his Father, so oft as the Lands were in their own Hands. It was Answered, That by the Cannon Law, that Priviledge was only Personal to the Monks themselves, and not to any singular Successor, as appears by the D. D. Panorm: &c. and therefore it cannot belong to the Defender. Replied, That the Priviledge is Nottour, and by a Decreet in foro recovered before the Commissars of Edinburgh in Anno 1589. It was found, That the Priviledge did belong to the Lord of Erection, and has ever been enjoyed fincefyne.

The Lords found the Alledgance and Reply Relevant.

Bond in Scotchform fignd in England. Graden against Ramsay. November 1664.

In an Action pursued by Grace Graden, as Executrix to John Graden her Father, against Doctor Ramsay, for payment of a certain Sum, contained in a Bond made by the said Doctor, and some other Persons to the said deceast John. It was Alledged by the Doctor, That the Bond being Subscribed many Years ago by the Doctor, and other friends of the Earl of Hul-derness a little after his Death, and the Money truly imployed for defraying his Funerals, the samen was truely payed back by the Earls Executors; though after so long a time the Doctor cannot now instruct the same: But he alledges, That the Bond can surnish no Action against him, because it was granted at the time, when both Subscriber and Receiver of the Bond were all living in England, and the Bond is dated in England where the Money was received: And therefore, as in England Bonds of that Antiquity do prescrive, so ought this Bond being now pursued in Scotland. It was Answerd, That the Creditors and Debitors were

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all Scotsmen, and the Bond drawn after the Scots form, and appointed to be Registred and to have Execution in Scotland;; and therefore it must be ruled according to the Law of Scotland. fee. D. CKVIII.

The Lords Repelled the Alledgance.

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CXII. Hay against Baillies of Elgine.

IN an Action pursued by Colin Hay against the Baillies of Elgine, for suf-ag R fering Andrew Ross to escape forth out of their Prison, where he was incarcerat for a Debt owing to the Pursuer, and therefore concluding payment against the Magistrates Actione subfidiaria. It was Alledged, That the Prisoner escaped, vi majore, having broken the Prison in the Roof by which he came forth. It was answered, Non relevat: Because the Magistrates and others under them, were obliged to Guard and Watch the Prison, that the Prisoner might not escape; so that unless he had escaped, by the assistance of fuch power as they were not able to relift, his escaping by their Negligence either at the Roof or Doors cannot defend them. D.xyı. exliii. The Lords repelled the Alledgeance.

Meikle against Listoun. 18 Movember 1664. 3 Freason in law why ar Reit-

relation of infollment dib'n Tonet Meikle as Heir general, Served and Retoured to John Meikle her Bro-by a most office. ther, pursues Reduction of a Disposition of a Tenement of Land, and certain other Lands made by the Defunct to Patrick Listoun, with the Infestment following thereupon; upon this reason, That he was Furious or Idiot the time of the Disposition, before and ever since during his Lifetime. It was alledged, That a general Service could not furnish a Title for an Action of Reduction, being to take away a real Right and Infeftment; and therefore, unless the Pursuer were infest, there could be no Process. It was answered, That the Alledgeance ought to be repelled, because the Pursuer could not be legally infeft upon a Retour, untill the Infeftment granted to Listoun were reduced: Because the Defunct non obiit ultimo vestitus & sasttus, being denuded by the Infeftment granted to Listoun; and therefore, properly that Infeftment should be first reduced, to the end that the Pursuer may be habili modo infeft upon the Retour; just as if a general Heir, were pursuing a Deed and Insestment to be reduced as done in lecto agritudinis, or an Heir of a Minor upon Minority.

The Lords Repelled the Alledgeance.

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The Decisions of the Lords

GXIV. Smitoun against Notman.

oxper inhometing. HeDeceast John Smiton did by his Letter-Will, Nominate Margaret Curror his Spouse, Robert and Besse Smitoun's their Bairns Executors, and did Nominate his Wife Tutrix, and George Curror of Honden, James Notman, Burges of Selkirk, and James Curror his Father in Law, Overfeers. The Relict medled as Executrix and Tutrix, having confirmed the Testament, and after her Second Marriage did medle also: The Children did raise a Process against the Heirs of James Notman (who being Overseer did medle also with the Defuncts Goods) for all that did belong to the Defunct intrometted with by him, or as he who ought and should have intrometted with the profits thereof: Super hoc medio, That he was Overfeer Nominat, & if fo, Pro-Tutor, after the Second Marriage, & Death of the Relict, by Subferibing Discharges & intrometting as Tutor. It was Alledged, That as Overfeer he could not be purfued, not being any ground of a Passive Title: Nor as Pro-Tutor, where there was a Tutrix Nominate. And though he might be conveenable Rei vindicatione, in quantum he did actually intromett with, yet not for what he did not intromett with; seeing albeit suo periculo, he did intromet with some things for which he was Comptable, yet having no legal Title, by which he could legally intromett, or call and conveen Debitors and Havers of the Defuncts Goods, he ought not to be pursued for what he did not medle with, and far less ought to be pursued for the Interest. It was Answered, That the Pro-Tutor having medled eo nomine it ought tobe imputed to himself, thathe had not a lawful Title, as Tutor, who without doubt might have procured a Tutoty Dative, which could not have been denyed him, at least if it had, an other would have obtained the famen, and been forced to find Caution: And therefore feeing he immiscuit fe as Tutor, he must be liable as if he had been Tutor Nominate, or Tutor in Law, or Tutor Dative: In either of which cases, he would have been comptable for the whole Estate and Interest, and for Omissa as well as Commissa.

The Lords before Answer ordained the Pursuer to produce all the Papers subscribed by the Pro-Tutor, which he would make use of to prove the Pro-Tutory, with a full Charge of the Commissa & Omissa by himself or by the Tutrix, or by the rest of the Overseers, and then after Confideration of his and their Carriage; they declared they would consider in quantum he should be made lyable, whether for his own-

Omissa.

Omissa as well as Commissa, and whether for the Ommissa and Comissa of the rest also.

Fork against Loudoun. 15 December 1664.

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Exhibition Jutor In Caro

A. Hugh Fork being Tutor of Law served to his Brother and Sister of a second Marriage, pursues Mr. Gavin Loudoun for exhibition of certain Writes belonging to the Children. It was Alledged, That the Defender is Tutor Dative to the Children, at least his Brother, from whom he has the Trust of the Writes as Tutor Dative, and concurreth to the Alledgance, That he having the Tutory legally established in his Person, is not obliged edere Instrumenta, to any who has not a Valid Tutory, or other In-Action terest. It was Answered, That it is not proper ante exhibitionem, to Dispute the Validity of either of the Tutory's; and the Pursuer, tho' he were not Tutor, but nearest of Kin to the Children, may have good reason to call for Inspection of their Writes, wherein they can have no Prejudice, but much more, being Tutor in Law served.

The Lords Repelled the Alledgance contra Exhibitionem, referving

to the Parties to dispute their Rights before Delivery.

CXVI. Inglis against Kellie.

Romoving wachang composing win festiment. Here was a Removing pursued at the instance of Mr. Cornelius Inglis app and Alexander Jack, as having Right from him, against William Kellie Tenent of certain Acres, who having Alledged, That his Master Rodger Hoge Advocat, to whom he was Tenent by payment of the Rents, was not Called, he being a Compriser; and upon the Comprising having Charged the Superior; which Alledgance the Lords having Repelled, and having ordained Mr. Rodger to Compear for his Interest, he did resume the Alledgance founded upon the Comprising and Charge against the Superiors, and his Possession of the Rents. To which It was Answered, That a Comprising and Charge without a Seasin, as it could not furnish a Title for an Action of Removing, no more can it Defend the Tenent in a Removing; otherways, a Charge without further Diligence, should be equivalent to an Infestment, which is a real Right. It was Replied, That a Charge is equivalent to an Infestment as to the recovery of Rents and Duties; because, the Superior being in Mora and in Culpa, that the Compriser is not Infest, no Voluntar Infettment granted by the Superior to any other Compriser can prejudgo.

prejudge the first Compriser, having done Diligence; and tho he cannot pursue a Removing without an Insettment, yet he may defend the Tenent from Removing at the instance of a Party, who though Inseft, yet his Right is not so Valid; Just as an appearand Heir may defend a Tenent, though he cannot pursue a Removing.

The Lords found the Alledgance Relevant in hoc judicio.

Tolerables. CXVII. Young against her Husbands Executors.

If event of the whole CXVII. Young against her Husbands Executors.

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On. DY Contract of Marriage betwixt the deceast James Buchanan and Agnes Toung his Spouse; He is obliged to provide her to a Liferent of 2 motod Lands and of a Sum of Money, with the Liferent of all the Conquest Heretable and Moveable; whereupon, the and her fecond Husband Walter Richardson, pursues the Executors of her first Husband, only for her Liferent of the hail Moveables, but for a Third thereof to a Terce of some Lands which she Liferents. It was Alledged, That seing she is provided to a Liferent of the hail, she cannot both enjoy the Liferent. and also have a Third of what the Liferents. It was Answered, That the Contract doth not exclude her from a Third of the Moveables which the Law do provide her to; and the Contract providing her to a Liferent, doth not say, that it is in Contentation of all Third. And tho a Wife be by Contract appointed a Liferenter of Lands, it will not exclude herfrom a Terce of fuch Lands whereof she is not Liferenter. Replied, That she being provided St to a Liferent, it imports as much, as that the should acquiesce with her Liferent, without claiming Interest to the Property of that which she Liferents; or else, if she will have a Third, she must renunce her Liferent, as x has been ordinarly found in Moveable Bonds containing Sums of Money provided to the Man and Wife in Liferent.

Which the Lords found also in this Case, conform to the preceed-

ingPractique.s Laro Sorth.

CXVIII. Scot against Wilson.

Sond in Sob form hand in England se Ichard Scots English Man, Indweller in Carlyle, charges John Wilson and John Henderson for 324 l. Starline and 500 l. Starl. contain'd Ingt in their Bonds, who Suspended upon this Reason, That they made Payment of a part of the Sums to certain Persons who were Partners with, or Factors for the Charger, which they offer to prove by their Oaths, and by

Contract of mariago.

the Chargers own Compt Books. Answered, Not Relevant to be proven by their Oaths, but by the Chargers Oath only, or by Write: And as to the Chargers Compt Books, he is content to Depone, there is no fuch thing in them. It was replyed, That the Charger being an Englishman, living at Carlyle, where the Bond was Subscribed, he ought to be ruled according to the Law of England, and the Sufpenders offer to prove that payment was made to the Partners, and that they were Factors and Partners is probable by Witnesses. Duplyed, That the Bond is granted by Scotsmen, appointed to be Registred in Scotland, and being drawn after the Scots form, the reason of Suspension is to be decided according to the Law of Scotland, which accordingly The Lords found: And that the reason thereof was only probable by Write or Oath of Party, but withal, before the Charger should depone, he was appointed to exhibite his Compt Books to the end Inspection might be taken thereof, whither any payment has been made of the Sums charged for to him, or others in his Name. To which end a Commission was granted to some unsuspected Persons, both to make inspection of the Compt Books, and to take his Oath also.

CXIX. Campbel against Campbel.

BY Contract of Marriage betwixt Alexander Campbel and Janet Campboplying for bel, the Deceast Alexander as Principal and certain Persons as Cautioners for him, are obliged to pay to the said Janet yearly the Sum of 80 lib. whereupon she intents Action against the Cautioners for payment. It was Alledged, That the Contract quoad the Cautioners is Null, being only Subscribed by one Nottar. Answered, That Marriage having followed, it Homologates the Contract and supplyes the defect of two Nottars. Reply'd, That the subsequent Marriage might supply the desect of a necessar Solemnity, quoad the principal Party Contracter, but not quoad the Cautioner and for this some old Practiques were Alledged.

The Lords found the Contract Null, quoad the Cautioners.

CXX. Brown against Watson 22 December 1664.

Eeorge Brown Merchant by his Ticket obliged himself to pay to John Ear of prison.

Watson 18 lib. Sterl. and in case of failzie 50 lib Sterl. and upon another Ticket, to pay to Thomas Main 10 lib Sterl. James Kirk being Factor to both the saids Creditors in November 1662 obtains a Decreet in absence before the Baillies of Edinburgh against the said George for the said sailzie of

50 lib. Sterling, and for the other 10 lib. Sterling, upon which he takes out an Act of Warding wherewith he apprehends the Debitor, and in the mean time while they are under Tryst, and the Debitor being so taken, to fave his Credit and for fear of Prison, he gives a new Bond relative to the Decreet for payment of the whole Sum, which Bond he Suspends and intents Reduction thereof, and of the said Decreet, whereunto it is relative upon this ground, That the Decreet was for not compearance; whereas if he had compeared, he would have alledged, that he could not have been decerned for the 50 lib. Ster. being but a Penalty for not payment of 18. which Exhorbitant Penalty in all Justice and Reason should have been restricted: and as to the new Bond, it was granted under Trysting and for fear of Prison, and loss of his Credit and Reputation. It was Answered, That the new Bond was granted by way of Transaction, whereas he had might have Suspended the Decreet; and fear of Prison not relevant, where it is not a private force, or Prison he feared, but Autore Pretore upon a legal Sentence, and in Execution thereof, Transactions in such cases being most lawful and not to be reduced. Replyed, That the Suspender being Surprised 5+ in this case, by the Act of Warding under Trysting, there was not only fear upon the part of the Suspender, but Dolus malus in the Charger to cause apprehend him when he was under Tryfting.

The Lords found they would modifie the exorbitant Penalty, the Suspender proving, that they were under Trysting the time of the

Caption or Act of Warding, or granting of the Bond.

Jailly of accourse of sacrossion CXXI. Calderwood against Pringle.

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He Deceast John Pringle of Cortleferry by his Contract of Marriage with Alison Pringle his Spouse in Anno 1632 obliged him to resign his Lands in favours of himself and his Spouse, and the Heirs to be gotten betwixt them; whilks failzieing his own Heirs what somever. The faid John Dixx being dead without Heirs of the Marriage of his Body, and his Lands by the old Infestment being tailzied to the Heirs Male, James Pringle of Willanlaw has obtained himself inseft therein as nearest Heir Male, and John Inglis of St. Mannorhead, and Marion Pringle being Heirs of Line to him, and they having assigned their Rights in favours of James Calderwood, he pursues the Heirs Male for fulfilling the obligements in the Contract in favours of the Heirs of Line. It was Alledged, The obligements being made by the Defunct, and the pursute being at the instance of the Heirs of Line their Assigney, and to

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their own behoof Debitum and Creditum is confounded; and tho it were not confounded, but that the Heirs Male might be thought lyable to the Heirs of Line, yet not in this Case; because; the Old Tailzie of the Lands was constituted by Infestment granted by the Superior, which cannot be taken away by any fuch Naked Obligement, unless Infeftment had follows ed thereupon from the Superior; because, Infestments of Tailzie as they are Constitute, must that same way be dissolved by an Infestment from the Superior: Likeas, To clear that it was not the Defunct's Mind to alter the Tailzie; that he did live many Years after the Contract, and did nothing thereupon in favours of his Heirs of Line, and which Contract was made for the use of the Wife in Liferent, and the Heirs of the Marriage; and whereas, Heirs what somever were Substitute, failzieing Heirs of the Marriage, his Meaning has clearly been of Heirs whatfomever contain'd in his old Infeftment, which were Heirs Male whatfomever. was Alledged, That by the Old Infeftment granted by the Superior; it was provided, That the Tailzie should not be altered without Consent of the Superior. It was Answered, That where an Obligement is only performable by an Heir Male, especially in favours of the Heir of Line; there can be no Consusion, the Heir Male being proper Debitor, and the Heir of Line Creditor: And the Question is not here, how a Tailzie should be perfectly Constitute or Dissolved, which no doubt must be by Infestment from the Superior: But here the Question is upon an Obligation for perfecting 2 Tailzie, viz. For refigning in the Superiors hands; which Obligation, the Defunct's Heir-Male is obliged to perform to the Pursuer, who willtake his own way with the Superior; and though there were such a Clause in the Old Infeftment, that the Tailzie should not be altered without the Superior's Confent, which is denyed, yet that takes not away the force of the Obligation against the Heir-Male; but that he ought to resign in favours of the Pursuer, who will take his hazard of the Superior, in whose Favours that Condition is conceived.

The Lords before Answer, ordained the Old Charter of Tailzie to be produced, that they may consider how it was Conceived, which they did, conceiving the Case to be favourable for the Heir-Male, in respect nothing had followed upon the Contract in the Defunct's time; and yet their Judgment was, that the Obligement, could not be made Void, but behoved to be sulfilled, unless something more did appear from the Old Tailzie.

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CXXII.

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The Decisions of the Lords

caujones ma curatory CXXII Cuninghame against Dennisson.

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James Cuninghame Charges Henry Denniston for payment of a certain Sum due to him by Bond, who Suspends upon this Reason, That the said James being Curator to the Children of the Deceast William Wilson; The Suspender stands Cautioner for him in the Act of Curatory. And true it is, That by the Chargers Mal-Administration, the Suspender is under Hazard, the Children having intented an Action, at least being ready to intent an Action against him, for Removing him as Suspect; and therefore the Suspender ought to have Retention. It was Answered, That the Suspender is not distressed; and there is no such Action intented, neither is there any Reason for it; and the Money Charged for, was borrowed after the Suspender became Cautioner, and bound himself to repay it faithfully.

The Lords found the Letters orderly proceeded, reserving to the Suspender Action as accords in the Law, against the Charger, for find-

ing new Caution, or for Removing him as Suspect.

presented of CXXIII. Steil against Thomas. 12 January 1665.

Atharine Steil as appearand Heir to her Father and Goodsire, pursues.

John Thomas for Exhibition of the Writes of certain Tenements addeliberandum: In which Action there being a Desence proponed, That her Father and her Goodsire were Denuded, and the Desender and his Predecessors had possest the said Tenements, as Heretors these 40 or 50 Years by-gon; The Lords before Answer, ordain d the Desender to produce such Writes as he had, to prove that they were Denuded, and according to the Ordinance, the Desender produced only, some Comprisings for very small Sums; which Sums, the Comprisers, and others having Right from them, did receive, and were fully satisfied by their Intromission before the Legal expired, as was. Alledged. Likeas, the Evidents pertaining to the Pursuers Predecessors, were in the Hands of Alexander Tule their Uncle, and after his Death John Meikle Taylor, medled with them, from whom, the Desender without the Pursuers Knowledge or Consent received them.

The Lords ordained the Defender ante omnia to exhibit all such Writes as he had concerning the Tenements libelled, reserving all Defences against the Delivery.

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Talling Cautioner; a gighey. CXXIV. Kincaid against Leckie. Eodem die.

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N an Action pursued at the instance of Kincaid against the Lairds of Leckie & Boquehan: It was found, That where in a Bond bearing Annualrent, the Principal Debitor was only obliged to pay the Annualrent (& not the Cautioner,) during the not payment of the said Principal Sum; yet one of the Cautionersbeing distrest, & the other Cautioners being obliged to Relieve him pro rata of all Coast, Skeith, and Damnage; They are lyable to the Cautioner who was distrest for payment of Annualrent, fince his distress and payment; and also found, That the Cautioner being Assigney, may seek payment of the haillSum, except his ownProportion; just as the principalCreditor might do, though the Cautioners be obliged to Relieve others pro rata only.

CXXV. Graham against Bruce. Eodem die.

IN an Action pursued at the instance of David Graham Taylor against George Bruce and Doctor Martine, to make Arrested Money surthcoming: It was found, That the loofing of the Arrestment did not liberat the Debitor in whose hands the samen is arrested, in regard it was still resting by him. un-uplifted by the Loofer.

CXXVI. Wallace against Wallace. Eo demdie.

Contract of mariago. Heir& ? of a mariage

Illiam Wallace, only Son and Bairn of the first Marriage, Procreat be ju relicha twixt William Wallace his Father and his Mother, pursues Hugh Wallace his Brother of the Second Marriage, as Executor confirmed to their Father, for imploying of 5000M. which their Father received in Tocher with his Mother, and was obliged by their Contract of Marriage, to imploy in favours of himself, and his Wife, and the Heirs, or Bairns to be procreat betwixt them: Compears Margaret Kennedy the Second Wife. in whose favours, the Defunct is obliged to imploy a Sum of Money, and to perform certain other obligements contained in her Contract of Marriage. And Alledges, That no Process can be sustained, at the Pursuers instance as Bairn, unless he were Heir served; and in that case, he would be obliged to fulfill the Second Contract of Marriage, and be also liable to his Fathers Debt. Likeas, that Clause conceived in the Pursuers savours can be inter-

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pret no other ways, then it would have been, if his Father had imployed the Sum in his own time, conform to the destination thereof: Now if he had imployed the samen by Infestment or otherways in favours of himself and Wife, and the Heirs or Bairns of the Marriage, he himself, would have been fiar, and the pursuer behoved to have been served Heir of the Marriage thereto, and confequently liable ut Supra. It was Answered, That the obligement, being conceived in favours of the Heirs or Bairns, it is equivalent as if the Word Bairns had only been fet down: And it is conceived, the Word Bains, is Exegetick of the Word, Heirs, and imports, no necessary part of a Service or Retour; for if there had been more Sons of the Marraige then one, all of them would not have been Heirs, and yet the obligement is in all their favours; and there is a great difference, betwixt a personal obligement, in thir terms, and an imployment by an Infestment, for where there is an Insestment, there is a Real Right, to which some must be served Heir in special, sor transmitting the Insestment in the Heirs Person, either as Heir of Line, or Heir of Tailzie and Provision: But in this case, there is no necessity of a Service or Retour, being only a personal obligement in favours of the Heir or Bairn, which the Heir, or Bairn, may purfue, without a Service.

The Lords sustained the Process, at the instance of the Bairn, as Bairn, Reserving consideration in its own due place, how far the Pursuer might be liable to Creditors: And in the mean time, Found, That the Relict should be preserved to the Pursuer, as to the Liserent of any thing provided to her in Liserent, by Contract of Marriage, but not what she might claim of the Moveables Jure relictæ.

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CXXVII. Ker against Logie. January 1665.

Years; and in June 1661 John Ker Goodsir and nearest Agnate, did take out Brieves for serving himself Tutor in Law, and caused execute the samen:
But in the mean time William Logic Goodsir on the Mothers side, obtains past in the Exchequer, a Gist of Tutory Dative; and thereaster, he obtained two Decreets against the said John Ker, by which he poinded his Goods, we won decreets turned into a Libel: And now, the said John Ker, pursues a Reduction of the said Tutory Dative, upon this reason; That before the Service Annus.

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Annus utilis was not out-run, nor before the taking the Tutory; and the reason why he did not find Cantion sooner, was the Desenders sault, who rendered him unable; and withal, the Desender is suspect, his Daughter having Married a Second Husband, to whom she has Children, so that it may be presumed, he will let a part of thir Bairns Means sall to his other Oyes, and a Practique was alledged in fune 1632 betwixt Irvine and Elsick. It was Answered, That Annus utilis is not allowed in this case, the pursuer having time enough to prosecute his legal Right, and might have done it long before the Desender purchast the Dative. And though it were true, that the Pursuer was pointed, yet that is no reason to make the Pursuer's Right good, and to reduce the Desender's; it being a legal Execution putting the Pursuer to no such incapacity, as to excuse him, so as to render his null Right valide, and the Practique meets not, for in that case the Service and Gift under the quarter Seal were debito tempore expede, and the Tutor did Administrate, tho he did not find Caution.

The Lords preferred the Pursuer to the subsequent Dative, he finding presently sufficient caution; which was ordained to be done.

CXXVIII. Eifher against Ker. January 1665.

Lexander Haliburton of Coldingknows, and Margaret Ker his Spoule, were obliged by their Bond, to pay to I lobel Lithgow the Sum of 1200 Merks, which the having Affigned to Mr. Michael Fisher her Eldest Son; he charges the said Margaret after her Husbands Death, who Suspends upon this reason, that the Bond is null being made by her Stante Matrimonio, at which time she could not oblige her self effectually. It was Answered, That the did ratifie the same judicially with an Oath, not to quarrel. Replyed, A Ratification, and an Oath cannot make a null Bond valide, both being done eadem Facilitate, As was found January 1663 bewiitwixt Dowglass and Birch. Duplyed, The Suspender was in effect prapositar negotiis mariti, and had the management of all, he being but a simple Man, to whom no Neighbour nor other; would trust any thing without her. Likeas, her power was fuch with him, That the caused him Dispone his whole Estate to her Brother Sir Andrew Ker younger of Cavers, reserving her own Liferent; and upon Condition that the Fie should also come to her in some cases mentioned in the Disposition: So that, she having bound her felf and Sworm, and gotten in effect his Estate to her and hers, the ought to be liable: notwithstanding of the Practique which meets not. Thee

The Decisions of the Lords

The Lords before Answer, ordained the Disposition to be produced-

CXXIX. Stewart against Stewarts. January 1665.

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requisition. Here being an Infeitment on the Lands of Errell, or rather an Annualrent forth thereof, granted to Umquhile Sir William Stewart of Garntully and Dame Agnes Moncrief his Spouse in Liferent, and to John Stewart their Son, for 10000 Merks, whereof the Lady was Liferenter only of the Annualrent effeirand to 8000 Merks; and there being a Clause of Requisition, whereby after the Death of Sir William, John has power to require the 8000 Merks with confent of his Mother Liferentrix; and before his Death he did require, but not with her confent, and upon the Requisition he did Charge. After John's Death, his eldest Son Pursues a pointing of the ground having obtained himself Infest, the rest of the Children being-Executors, and having confirmed the said 8000 Merks: They Alledged, The Sum is moveable and belongs to them as Executors. It was Answered, The Requisition is null, not being done with consent of the Liferentrix. Replied, Esto argumenti causa, the Requisition should have been null as to this effect, that John the Fiar could not have compelled the Debitor to pay, unless the Requisition had been used with her Consent; yet, ad effectum, to declare his mind, that he would have the Money, and so make it moveable, it is that fufficient. Burlyed, The famen Requisition would have been sufficient enough, if the Fiar had offered Caution to the Liferenter to make the Annualrent forthcoming. Duplyed, That the Requisition being made contrair to the Contract, it could not be valid to loose the Infestment, which stands in the same force as if Requisition had not been used, nor could the Requirer have compelled the Debitor to pay upon Caution, where her consent to require was expresly requisite; Which is more then the case of a simple Liferenter, where the clause of an express consent is wanting. And in that case also, it is in the power of the Lords to Judge, whether the Liferenter or the Fiar x should command the Money; which they do sometimes the one way and sometimes the other as they find the circumstances do require, and according to the sufficiency of the Cautioner offered by either Party. See Ny 1.2.425 P.2 The Lords found the 8000 Merks Moveable.

Hyoffiecan . Anderson against Provan and the Town of Edinburgh. A Lexander Provan Cultomer at the Neather-Bow, being Debitor to William Anderson Merchant in a Sum of Money, William Arrests in m's lenent the Hands of William Gardner all Sums due by him to Provan, and there-

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upon gets a Decreet before the Commissars of Edinburgh, to make furthcoming; whilk Decreet is Suspended by Gardner, as being distrest by Ander son on the one part, and by Donaldson, Provan's Assigney on the other In this double Poinding, Compears the Town of Edinburgh, and Alledges, They must be preferred to both Parties; because, Provan being their Customer for payment of a Tack Duty, and Gardner being no otherways Debitor to Provan, but as his Sub-tacksman of the same Customs: the Town for these Customs, has a Tacit Hypotheck in the Duties owing by the Sub-tacksman to the Principal Tacksman, and upon that account, are preferable to the other Creditors, who have no fuch Priviledge. It was Answered. That this is not the Case of a Master or Land-lord, who has a Hypotheck in his Tenents Goods upon the Ground, the Debt owing by the Tacksman, being only a Personal Debt, consisting in Obligation, and not in rebus. Replied, That a Master has not only a Hypotheck in his Tenents Goods: but if his Tenent fet any part of his Lands to a Sub-Tenent, for a Duty payable to the principal Tenent, the Master will be preferred to the Duty payable by the Sub-Tenent, to all Creditors Arresters, for the Principal Tenents Debt. And it was further Alledged for the Arrester, That the Town of Edinburgh was secured by a Responsal Cautioner, viz. Donaldson, who was bound to them for the Principal Tacksman; whereas this Arrester, has no other way, for payment of his Debt due by Provan. Answered, That though it were so, yet they were not obliged to distress a Cautioner where they may otherways find themselves secured by any thing owing to the Principal; and they had good reason to do so, even for the Cautioners Relief.

The Lords preferred the Town of Edinburgh.

And thereafter it being pleaded, that the Town of Edinburgh was satisfied by the Cautioner to whom they had Assign'd the Tack for his Relief.

The Lords found, that the Cautioner Affigney, by his Affignation, had the same priviledge competent to him, that the Cedent had, and therefore preferr'd the Affigney.

CXXXI. Lyon against Farqubar. January 1665.

John Lyon of Inneresk, as Tutor Testamentar to James and Alexander Annands, Charges Sir Robert Farquhar, for payment of 3200 Merks of Principal owing to umquhile Mr. Thomas Annand, by Bond, payable to him, and after his Decease to his two Bairns; who Suspends upon this Reason,

Sutor Stestam?

That by the Testament, wherein he is Tutor Nominate, he has only power to uplift the Annualrent. Likeas, The Principal Sum is sufficiently secured by responsal Cautioners, and (if need be) the Suspender is willing to give further Security at the fight of the Lords. It was Answered, That by the Testament he is Simpliciter nominat Tutor, and the the after-words of the Testament, give him power to up-lift the Annualrent, yet it excludes him not from doing Diligence, and to up-lift the Principal Sum; and if he should do no Diligence, he would be lyable to all Hazard; neither will the Charger Debate, whether the present Security be sufficient or not: But it is sufficient, that the Tutor being unquestionably Responsal, desireth to have power of the Money himself, to the behoof of the Pupils; that when their necessity shall urge, either for putting them to Callings, or otherways, he may be readier to make it furth-coming, as becometh a Faithful Tutor.

The Lords Sustained the Charge for the Principal Sum.

Tutor. Roufar accomptable for ovent

CXXXII. Boyd against Kintor.

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of @rent. IN an Action pursued at the instance of John Boyd Baillie of Edinburgh against Mr. William Kintore. The Lords found, That albeit a Tutor be not Comptable in Law, for Annualrent of any Annualrent uplifted by the Tutor; and resting unexpended, the time of the Tutory; yet what Anpualrents are resting by him, at the expireing of the Tutory, or for which he is Comptable, as not having done Diligence, for the same, against the Debitor, the Tutor is obliged for Annualrent thereof, continually after the time the Pupil passes Pupillarity.

> Scot against Scot. Fanuary 1665. CXXXIII.

the Laird of Wauchtoun, being Debitor, to the Deceast Sir William Scot of Clerkingtoun, in the Sum of yooo Merks, and Sir William having granted Provisions to his Children by Assignations to Bonds; among the rest, he did Assign his Daughter Margaret, \$6000 Merks of Wauchtours Debt, with power nevertheless to him to uplift, or otherways Dispone upon the samen, dureing his own Lifetime. Clerkingtown having otherways to do with Money, did uplift and otherways Dispone upon all the faid Debt, except 2000 Merks (which was only left to Margaret undifposed of for her Portion, and Wauchtoun being insolvent, Sir William trusts an Assignation in the Name of John Scot, to the effect he for that and other Debts

Comprising.

Brafild, percopt. & confumpt.

Debts owing to John Scot, and others who also trusted him, might deduce an Comprising for their Security; and John gives a Back-bond, acknowledging his Name to be Trusted, and oblidges himself to Denude in favours of Sir William his Heirs and Affigneys. Sir Lawrence Scot, as Heir ferved and retoured to Sir William, pursues John Scot for denuding himself in his fayours, as Heir, conforme to the Back-bond. Compears the faid Margaret, and Alledges, That John ought to denude himself in favours of her; because, her Father having Assigned the said 2000 Merks, with Power to him in his own Lifetime, to Up-lift and Dispone thereupon; and he having made no Right thereof but in Trust, the Trust must be interpret in the Terms as the Debt stood in Sir William's Person the time of the said Assignation made to John, which was affected with an Assignation made to Margaret; and tho he had otherways power to dispone, yet when he made that Disposition in favours of the said John, it was only in Trust and Security. and cannot be thought such a Trust as alters his Intention toward his Daughter, having no other Provision, unless he had per expressum declared it. Likeas, The Back-bond being in favours of Sir William his Heirs and Affigneys; the Word Affigney must relate to the Affignation formerly made by himself, unless he had granted a new one; and the Adjection of the Word Heirs, only was to clear that the Fie was still to be in his Person to Use and Dispose thereupon at his pleasure, which was also reserved to him in Margarets Assignation: So, that unless he had made a New Assignation, or Declaration of his Minde, that the former Affignation should not stand, the Debt and Comprising cannot belong to his Heir.

The Lords preferred Margaret.

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CXXXIV. Graham against Broun's.

John and William Broun's having Comprised the Lands of Overharcleugh complined from Robert Johnstoun in Anno 1655. & William Graham of Bluetwood having Comprised the saids Lands within Year & Day; He pursues the first Comprisers, for Compt & Reckoning of the by-run Mails intrometted with by them, that he may come in pari passu with them, conform to the late Act of Parlia-act. 62 Public ment, and may be preserved a-like, the first Compriser having only his Charges allowed to him in the first end. It was Alledged for Broun's, That as to the by-runs, they are bona side possessors, having up-listed and consumed the same, according to the standing Law in Force for the time; and there is neither Law nor Reason to make them comptable to a Party having

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a Posterior Right, for what they had so up-listed, before the making ofthat Supervenient Law. It was Answered, The Law makes no Distinction, but brings in both together, and preferrs only the first Compriser as to the

Expense.

The Lords found, That though the Purfuer Graham should come in pari passu, yet not so, but that the Defenders should lucrari, and be preferred, as to what they bona fide up-lifted, according to their Right, & the Law then standing for which, nevertheless, the Lords found, The Defenders should Compt, to the end, the Expense waired out, may be first allowed to them, and the Remainder ascribed for payment of the Debt pro tanto; and for the Superplus Debt, the Pursuer and Desender are to come in pari passu. Sortament Muncupalite

CXXXIX. Shaw against Lewis January 1665.

Succession in molecular.
Succession in molecular.
He Deceast William Shaw Factor at London, having left a considerate and the Deceast William Shaw Factor at London, having left a considerate and a legisland, and a part in Scotland; William Shaw Merchant in Edinburgh, being his Cousin German and nearest of Kin, obtains himself confirmed Executor Dative to him, before the Commissars of Edinburgh, and pursues for the Debts owing to the Defunct, in Scotland. Compears Anna Lewis an English Woman, And Alledges, That she ought to be preferred, because she was Nominate Executrix, and universal Intromissatrix by the Defunct, by a verbal Nuncupative Testament, which Testament and Will, was proven in the Court of Probat of Wills, at London, and that the Defunct was fanæ mentis, and did expressy exhereditate the nearest of Kin, as Persons not deserving at his hands. To which it was Answered, That we have no such thing as Nunx cupative Testaments in Scotland, it being necessar that all Testaments be fubscribed by the Defunct, or by a Nottar, or Minister, de mandato; and though a Nuncupative Testament be validin England, as to any Estate in England; yet it cannot be of force, to take away an Estate in Scotland, from the Subjects in Scotland, who, and Estates in Scotland, ought to be ruled by the Laws of Scotland. Replyed, That albeit Lands and Heretages, must be conveyed according to the Laws of the Place where they ly, yet Moveables, which consist most part in nominibus debitorum, sequuntur personam, and must be ruled, according to the Law of the Place where the Creditor lives and dies. Likeas, in the Court of Appeals in England, the faid Anna is preferred to this Pursuer Compearing. Answered, That whatever has been found

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in England, as to a Nuncupative Testament and Goods in England, it cannot be the Foundation of any Decision in Scotland; and therefore, if in Scotland a nuncupative Testament will be found no Testament at all, it can be no Title to carry the Moveables in Scotland, from the nearest of Kin, & Subjects of Scotland; Neither is there any difference in Scotland in this cafe betwixt a Moveable or a Personal Estate, and Real or Heretable Estate, seeing in the Succession to either, there must be a legal Title in the Person of the Successor, according to the Law of Scotland. Now a verbal Testament in Scotland, is of no force, as to the Nomination of an Executor, or an universal Legacie, nor to any particular Legacy, above 100 lib. Scots, whereas this Defunct's Moveables were of grear Value, and the least part of themin Scotland.

The Lords Repelled the Alledgance and Reply, and found that the Nuncupative Testament would not be sustained as to the Moveables in Scotland.

CXXXVI. Blacket against Bunkle, 26 January, 1665. passibe hild.

TIlliam Blacket Mercant in Newcastle obtains a Decreet against Helen Bunkle, Relict of John Loran in Kelfo, for payment of certain Sums as being the remainder of a greater Debt owing by her Husband, whereof the entered in payment, and promifed or constitute her felf Debitrix for the rest: The Decreet is Suspended upon this reason, that it is without lawfull Probation, there being nothing produced to verify her to be Debitrix; the most that can appear being only, that she payed a part, and defired his forbearance for the rest, which bindeth not the Debt upon lier unless she had promised payment.

The Lords found, that this was no valid ground to Decern, and

therefore Suspended Simpliciter;

Baptie against Barclay. January 1665.

3. copula sitan Teorge Baptie gives a Ticket to Christian Barclay, acknowledging that fill of nuplia a Child the had brought furth, was his under promife of Marriage, demonstrant. whereupon she pursued him before the Commissars of Edinburgh, for Adherence, and obtained a Decreet, whereof he raifed Suspenson and Reduction, upon this Reason, That she being a Taverner, loose, and of a very leud life too; He could not deny, but that he had Carnal dealing with her, and

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was perfuaded, she had dealing with diverse others also, tho upon him, the fathered the Child; and long after the Birth of the Child, the did most Subtilly and Falfely Exprobrate, and affirm upon him, that he had made a Promise, and upon a certain Day came to him on the Streets, and told him, the would prefently go and drown her felf, if he would not Subscribe the Ticket, which he simply was moved to do, though he was content to make Faith, that he had never given her such aPromise; after wards he ever still more and more abhorred her, and never used her Company, mean time the brings furth an other Child, long after the Ticket: So, that granting he had truely made a Promise as the Ticket bears, she has. forefaulted the benefit thereof, by her After-Whoredome, which would be a lawful ground of a Divorce if they were lawfully Married, and far more ought it to be a ground, to impede the Solemnization of a Marriage, or Adherence. It was Answered, That Copula, and the Ticket under his Hand bearing the Promise, made a validim & ratum Matrimonium, and any Child gotten thereafter, the Law presumes to be in the Marriage, filius enim est quem nuptiæ Demonstrant, unless the Pursuer can offer to prove her an Adultress with an other; In which Case, he may pursue a Divorce, and soit was found by the Commissars. Replyed, That the the Ticket did bear a Promise and Copula, yet the Marriage was not legitime Solemnized, nor did there any Co-habitation follow; and therefore the aftewards playing the Whore, and bringing furth a Child, unless it could be made appear, that he did Co habit, or any otherway Converse with her, (so that it might be at least probable, that he had dealing with her) that Presumption of the Law, in this Cale, cannot have place.

The Lords before Answer, ordained the Defender to Condescend, whether or not she can make it appear, that ever she conversed with the Pursuer after the subscribing of the Ticket, or was in his Com-

pany, and when, and where.

CXXXVIII. Laird of Lintoun against Laird of Torsonce.
January 1665.

He deceast Laird of Eintoun and Sunderlandhall gives a proper Wodfet of the Lands of Kippilaw to the deceast Sir George Ramsay of
Williecleugh, redeemable for 5000 Merks; which Wodset is Comprised by
Pringle of Torsonce, (who had Married Williecleugh's Daughter,) from the
Heir of Sir George; and upon this Comprising, he requires Sunderlandball
as heir to his Father, for payment of the 5000 Merks, and Charges, who
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Suspends upon this Reason, that conform to the proper Wodset, his Father had put Sir George Ramsay in Possession these many Years; and therfore, how, and by what Conclusion, he lost Possession, he knows not, seing Andrew Ker of Kippilaw, is, and has been in Possession these many Years; and therefore, unless the Pursuer, not only renounce the Wadset, but put the Defender in pollession, he ought not to be decerned to pay. It was Answered. That the Pursuer being a Compriser, he was not, nor is obliged to seek Possession, but finding the Defender obliged to pay upon Requisition, he may lawfully require, and upon payment he shall renounce the Wodset; upon which Renounciaton, the Defender may pursue the said Andrew Ner for Possession, who bruiks by no Deed of the Pursuer. Replied, That the Pursuer, can be in no better Case, than his Author Sir George Ramsay, his own Father-in-law, who if he had been pursuing, the Defence would have been very Relevant against him, seing he was put in the Possession by vertue of the Wodlet; Nor can the Defeder know, how Andrew Ker got the possession, whether by a Deed of the Pursuers, or his Authors, or what other way, it being clear, That the Wadfeter, or Compriser of the Wadfet, should put the Granter of the Wedsfet, upon his payment of his Money, in his own Place and Poletion, and the Comprifer, hould before the Charge, first Agene against the faid Andrew, upon his real Right, that it may be known quo mode Gjure, he possesses.

The Lords found, That the Purfuer should not only renounce, but

Re-possess before payment. Sos Staits. p. 271. B.

CXXXIX. Wein against Kennedy: Fanuary 1665.

Illiam Weir of Clarkston, being charged at the instance of William Kennedy of Auchtifardel for payment of a Sum of Money contained in his Bond, Sus pends upon a reason of Minority and Lesion. To which It was Answered, That he cannot be heard to object Minority, because in the Bond he acknowledges himself to be Major, and by the Law in such cases Restitution is not competent Quia minoribus decept is non decipientibus jura subveniunt. Replyed, That eadem facilitate he was induced to Subscribe the acknowledgement, as he was to Subscribe the Bond; neither can the acknowledge ment operate in favours of the Charger, who was Tutor or Curator to the Suspender, and consequently obliged to have knowen or tryed his Age. Likeas, There is a Clause in the Bond obligeing the Suspender not to Rework the Bond upon any ground whatsoever: And there can be no imaginable

ginable ground beside Minority and Lesion; which clearly evinceth, that the Charger has conceived the Suspender to be Minor, when he took him so obliged.

The Lords Repelled the Answer, in respect of the Reply.

Yubmi Bion year & day.

CXL. Meinzies against McGriger. February 1665.

Nan Action betwixt Menzies and McGrigar. The Lords found, That a Submission, bearing no day betwixt and which the Arbiters should de-2019 termine, expires after Year and Day, and is not as a Bond obligeing Parties to a Submission, which doth not so expire.

Interruption. Exaculion of a Try eforst of 40 years.

days of comple GXLI. Butter against the Laird of Ballegerno. February 1665.

IN an Action Butter and Gray of Ballegerno: The Lords found, That a Summons rais'd upon a Bond and Execute, tho the day of compearance was after 40 Years, the Summons and Execution being before the expireing of 40 Years, is sufficient to interrupt the Prescription.

Clay o maitant declarator

CXLII. Hepburn against Nisbet.

TN an Action of Removing, pursued at the instance of Helen Hepburn against Adam Nisbet Writer, there was a Defence proponed upon a Liferent Tack. It was Answered, That the Tack was Null bearing, that in case two Terms Duties should run in the third unpayed, it should be null, without Declarator: But so it is, the Defender hath failzied. Replied. That such Clauses irritant, are never sustain'd without a Declarator of the failzie. Duplyed, That tho it were so, in matters of Heritage or great Importance; when a dwelling House is set so, with a Clause irritant for fure and precise payment of the Mail; it is no reason to prejudge the Setter, of the Liberty of her own House, if the Tacksman failzidin due payment of the Mail; and in Law and Reason, the Setter should not be put to a pursute of Declarator in such a case.

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The Lords Repelled the Alledgeance and Reply, in respect of the Answer and Duply.

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CXLIII. Baird against the Magistrates of Elgine. February 1665.

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Obert Dumbar of Burgie, being Apprehended upon a Caption at the instance of Sir John Baird, and delivered to the Magistrates of EL gine, for not payment of two Debts, one above 1000 l. and another beneath: after he was a Fortnight in Prison he escaped, whereupon the Magistrates are conveened Actione Subsidiaria for suffering him to escape out of their Prison: And for payment of the Debt. It was Alledged, That they could not be decerned to pay the greater Sum, because the Rebel had taken the benefite of the Act of Parliament betwixt Debitor and Creditor. and shew a Testificate thereof, under the Clerk to the Bills hand, the time of his Apprehension; whereupon the Magistrates took Instruments and Protested, they should not be holden to detain him in Prison for that Debt. It was Answered, That the Alledgeance was not Relevant, unless it had been made appear, that the Rebel had payed his Annualrents conform to the Act. Replyed, That the Magistrates were not Judges to the payment or not payment of the Annualrents: And alledged a Practique, where the Magistrates of Stirling being charged to take a Rebel who had the King's Protection, suffered the Rebel to pass, without taking notice whither the Annualrent was payed or not. Duplyed, That the Rebel had not the benefite of the Act, unless the Annualrents had been payed, according to the express condition thereof. Likeas, the Rebel being imprisoned, they were in Mala fide to suffer him to escape, unless upon the said Act they had gotten a charge to put him at Liberty, which he could not have obtain'd, except he had showen that the Annualrents were payed, and the Practique meets not: For in theother case the Rebel was not stall imprisoned.

The Lords Repelled the Alledgance and Duply: And thereafter it being Alledged, That he had escaped vi majore which the Magistrats could not fore-fee, nor prevent; which, as it was qualified and found

Relevant, was admitted to Probation. D. XVI. CKII.

CXLIV. Murray against Balcanqual. February 1665.

master & Jennent

Ir Andrew Murray of Pitlochie having set a Tack of a Room to James Bak canqual his Tenent, for certain Years; The said James has not only Tilled the Swaird of some parts which was never Laboured before, but has over-limed it so, that if he continue, he will render the Room altogether

Correi debendi

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gether uprofitable to his Master, after the expiring of the Tack, and therefore Conveens him, for Damage, and to desist. It was Alledged by the Defender, That he being the Tenent, might dureing the Tack, labour the Room for his own Advantage any way he pleased, not being otherways provided by the Tack. Replyed, That the Desender being a Tenent, ought to Labour tanguam bonus pater familias, and as Tenents are in use to do, not to distroy the Ground in the end, but to Labour it so, as that it may return to the Master in a Reasonable Condition, else Tenents, if they should be sufficient to Labour as they will, may distroy the very subance of the Lands.

The Lords before Answer, ordained a Trial to be taken of the way of the Tenent's Labouring, and Condition of the Ground, how it was,

and is, and may be by the way he Labours.

CXLV. McMath against Monteith.

Here being a Bond granted by the deceast James Nisbet, William and Fames Arnots, all Conjunct Principals to Gilbert Gourly for a Sum of Money; whereupon Gilbert Comprises the said James Nisbet's Lands; Thereafter, the faid Gilbert Affigns the Debt and Comprising to the deceast Sir William Nisbet Brother to James, with an express Condition, That he should use no Execution against the two Arnet's; and Sir William Transfers his Right to William Monteith of Egilfhaw upon the fame Condition, who dispones the same to William Monteith his Son-in-law, who enjoys the Land by Vertue of the faid Comprising, being now long expired: Elizabeth M'-Math being Executrix to the deceast William M' Math her Father, and who has gets a Decreet cognitionis causa against the appearand Heir of the said Umquhile James Nisbet, and Adjudges the faid Land; and upon the faid Adjudication, with Concourse of her Husband Mr. John Anderson, pursues a Reduction of the faid Monteith's Right upon diverse Reasons, specially, That the Assignation granted by Gourlay to Sir Willam Nisbet, and the Translation granted by him to Monteith, both contain the faid Provision, That they should not use Execution against the said Arnots, who were Correi debendi, which, being pactum de non petendo, is equivalent to a Discharge of their parts of the Debt, and consequently makes the Comprising Null and Extinct, at least as to the two parts. It was Answered, That the Reason of Reduction is not Relevant, because, all three being bound Conjunctly and Severally, it was lawful for Gourlay, to use Execution against any one, or all, at his pleasure; and in the Assignation, he might also provide, That the

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Of Council and Session, 1665.

Assigneys should not use Execution against two of them, but the third only; which noways did exoner the third Correus, unless the Assignation had granted the Receipt of the other two, of their parts, and had Discharged them thereof: And that Provision, of not using Execution against the two. could not impede the third who was distrest, to seek his Relief against them, notwithstanding of the said Provision, unless they-had payed and been clearly Discharged.

The Lords found the Answer Relevant.

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onfirmation of leftament. Disposition grate Rolenta nossessione

CXLVI. Procurator Fiscal of the Commissariot of Edinburgh against Sundry. June 1665.

Na Suspension raised at the instance of certain Persons, against the Procurator Fiscal of the Commissariot of Edinburgh: There was a Reason bearing, That the Suspender was not obliged to confirm the Defuncts Moveables, because they were all Disponed to him in the Defunct's Life: And as the Disposition would exclude any other Executor if he had confirmed the Goods, so ought it to secure the Suspender against the Fiscal. It was Answered, That the Defunct remained in possession all his time, and if fuch a Disposition should be sustained to exclude Confirmation, then not only should all Confirmation of Testaments be evited, but also Creditors should be prejudged by Relicts and others, whom it concerns to know the value of the Defuncts Goods, by giving up Inventar, and confirming, notwithstanding of any such pretended Disposition, whereof there may be any rust ground of quarrel.

The Lords found the Letters orderly proceeded, notwithstanding of the faid Disposition, and ordained the Suspender to Confirm.

Procurator Fiscal of the Commissariot of St. Andrews Confirmation of Jan. CXLVII. against the Laird of Balhousie.

A faculty to the N like manner the same Moneth betwixt the Procurator Fiscal of the disposer last Commissariot of St. Andrews and Hay of Balhouse. Sona morni Con

The Lords ordained Balhouse to confirm, notwithstanding that he had a Disposition with Possession, a long time before the death of Mr. Francis his Father, who was Blind and had quite the Possesfion to his Son; in respect, the Disposition carried a Clause, that notwithstanding thereof, his Father might in his own time Dispone

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Holograph willy.

The Decisions of the Lord's

any other way thereupon at his pleasure: And therefore, least the Bishops should be prejudged of their Quotes, by such Dispositions, which all dying persons may grant, not only to their prejudice, but to the prejudice of Creditors also: The Lords Decerned ut supra. Rocustom at pate the vale to the gathe prestoding docision is absorpated by act. 2001. Part. 1690.

probation CXLVIII. Braidie against the Laird of Ferny. June 1665.

Hristian Braidie being insest in certain Tennements and Acres in Comper of Fife belonging to her Debitor, she pursues the Laird of Ferny, Jamison and Glassoord, for reduceing of certain Dispositions made by her Debitor, Ex capite inhibitionis; in which Reduction the Dispositions being produced. It was Alledged, That this Ferny, who was called as Appearand Heir to his Father, should be Associated, because the Disposition was Anterior to the Inhibition, and the Insestment thereupon, Anterior to the Pursuers Apprising or Insestment. Answered, That the Disposition was null because it wanted Witnesses; and albeit it mentioned Holograph, as written with the Disponers own hand, yet that could not prejudge a third Party a lawful Creditor who had served Inhibition, else it should be in the power of any to Antedate Writes at their pleasure to prejudge Creditors and others.

The Lords before Answer ordained the Defender to instruct the Verity of the date by Witnesses, Omni exceptione majores.

And the Defender having used two Witnesses only, one of them being a Procurator in the Sheriff Court of Cowper, and the other being a Town Officer.

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The Lords found they were not such Witnesses as would astruct the verity of the date, their Depositions being most suspect, in regard, they declared, they saw the Disposition Subscribed, and one of them, that he had dictat the same, whereas they might very easily have been Subscribing Witnesses if their Depositions had been without and above Exception. The Lords also considered, That no Insestment had sollowed till near two Years after the date, and long after the Inhibition; and therefore, they ordained Ferny to use surther Probation for astructing the Date, with Certification, they would reduce, notwithstanding of the Probation of the two Witnesses already adduced.

CXLIX.

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Lic a P CXLIX. Thorntown against Milne. June 1665.

Date compensation subtaccompt.

Ichart Thorntoun an English-man, as having Right from Patrick Seton of the show to a Ticket of 641 l. gtanted by William Milne to him, for cer- probabon tain Merchant Ware, obtains a Decreet before the Baillies of Edinburgh for complete docket payment, against the said William Milne, who Suspends and intents a Re- no Book of the duction upon this Reason, That the Bailies had Repelled a most Relevant Reason of Compensation, founded upon a Subscribed Accompt, by which the faid Patrick Seton acknowledges himself Debitor to the Suspender for 126 l. for Merchant Ware, also exprest in the Compt, dated in March 1663, whereas the Affignation was not Intimat till the Seventh day of May there-To which It was Answered, That the Baillies did no wrong, because the Ticket subjoyn'd to the end of the Compr had no Date, and confequently was Null, especially being written with another Hand than the Compt it self; and though the Date of the Furnishing was set down on the head of the Compt, yet that Date could not be interpret the Date of the Obligation subjoyned. It was Replyed, and offered to be proven by the Witnesses Subscribers of the Ticket, That it was truely Subscribed of the Date of the Compt.

Which the Lords found Relevant hoc loco, notwithstanding of the

Decreet.

CL. Stevinson against Ker. June 1665.

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IN a Process at the instance of James Stevinson and Patrick Wat, as Execution and cutors ad ommissa decerned to Umquhile William Stevinson, and having Licence, the Licence being quarrelled as not sufficient to surnish a Title for a Process, without a confirmed Testament Dative.

The Lords sustained the same, in respect they were decerned thos not confirmed; To which Decreet Dative, the Executor Principal was called, who had the only Interest to quarrel the Dative, and that before Sentence, the Debt must be confirmed.

CLI. Watherstone against her Tutors. June 1665.

IN a Process pursued at the instance of Margaret Watherstone and John Lermont her Husband against her Tutors, for making Compt, Reckoning

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for hing, and Payment of her Fathers Moveables pertaining to her. It being Alledged, That they could not be further Charged than the Inventar contain'd in her Fathers confirmed Testament. It was Answered, That the Inventar being given up, and confirmed by the Tutors themselves; the Pursuers offered to prove by their own Oaths, That they intrometted with more than was confirmed, and greater Prices than these confirmed. Replied, That they were not holden to Swear contrary to the Oath in Testament. Answered, Sibi imputent, and Tutors giving up Inventar in Name of their Pupils, should do it so faithfully, as they may not be lyable to Circumvention and Omition therein, else, Minors could be in no Security, who, in such cases, are more priviledged than others.

The Lords Repelled the Alledgance, and ordained the Tutors to Swear; but withal, if any thing after Oath should be found omitted, or ill appretiat, that the same shall be confirmed by a Dative before

- Sentence.

Redemation. comprising of replion

Beg against Beg June 1665.

Homas Beg Merchanthaving Infeft his Son in certain Lands in Edinburgh, redeemable by payment, or Confignation, of ten Merks, Thomas uses an order of Redemption, and pursues Declarator of Redemption, against John his Son. Who Alledges, there can be no Declarator, because Fohn having comprised the Reversion, upon a Debt owing to him by his Fa-1800 Stairs ther, viz. For the third of his Fathers Moveables, belonging to him as Executor to his deceast Mother; for which third, he obtained Sentence against his Father, upon which Sentence, the Comprising was deduced; and the order cannot be sustained, unless there were an order against the Comprising, Because by the Comprising the conventional Reversion, is consolidate with the Property, in the Person of his Soil. It was Answered, That the Comprifing was but lately deduced, and the legal not expired, so that the Father might redeem the Right made by him to his Son, which will not prejudge the Comprising, Just as if there had been two Comprisings deduced against the Father, he might redeem the first Comprising but prejudice of the Second, and in his own time, he might redeem the Second also. Replied, That the first and second Comprisings, being both in one Mans Person, both ought to be redemed together; because by the second Comprising, the Reversion of the first was taken away from the Party against whom it was deduced, and fettled by the Second in the Comprisers Person. And therefore, both De-

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behoved to be redeem'd, and not the first without these cond, Multo magis when the first Reversion being Conventional and settled in the Comprisers person, the one cannot be redeemed without the other.

The Lords'refused to sustain the Order, unless the Comprising

were redeemed also. for. D. clx v. p. 116.

CLIII. Kennedy against Agnew. Ultimo Junii 1665.

Ndrew Agnew younger of Lochnaw, granted a Bond for 1000 lib. to not spice Thomas Hay of Park his Father in Law, which being Affigned to cafe arish. Thomas Kennedy of Kirkhill, he charges young Lochnaw, who Suspends: And intents Reduction, with concourse of Sir Andrew Agnew his Father, upon this Reason, That the said Andrew, having Married Park's Daughter, Sir Andrew did provide his Son and her, to a competent Provision, and the Heirs of the Marriage also: For which, in Name of Tocher, Park was obliged to pay Sir Andrew, 10,000 lib. this being a folemn Contract of Marriage, Park did, most fraudulently, contra bonos mores, without the privacay or consent of Sir Andrew, procure this Bond from his Son in Law, the time of the Contract, there being nothing treated thereof, betwixt the Parents. It was Answered, That the Reason is no wayes Relevant, because Park having given a considerable Tocher with his Daughter, for which the Provision was made by Sir Andrew to his Son, it was lawful for Park to take a Bond for so small a Sum, being only the tenth of the Tocher, and which was only payable after his Wifes Death, wherein no Circumvention was used nor Enorm Lesion to the granter.

The Lords in respect of the Meanness of the Sum, and small Lesion,

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CLIV. Edgar against Edgar. July 1665.

BY Contract of Marriage, betwixt umquhile David Edgar of Rethick, is and Anna Blair his second Wise, Anno 1633, David, having then a division of his first Marriage, did oblige himself, and the Heirs of the first Mar-sachice on riage, which saizieing his Heirs whatsomever, to pay, to the Bairns of the second fecond Marriage, a certain Sum at their Age of 21 Years, if they were Sons, and if Daughters, at their Age of 18 Years, with Annualrent till the Term a paradox of payment. The Son of the first Marriage, as also the two Eldest Sons of the second Marriage, having dyed, the third named David

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is served & retoured Heir to his Father, & there being only one Daughter of that Marriage Hobel pursues the said David, as Heir to his Father, for the whole 4000 M. It was Alledged, That she can claim only asourth part, because there were Four Children surviving the Father, and the Heir of the first Marriage. Answered, That the two Eldelt Sons dyed before the payment of the Principal Sum; & as to the Defenders part, he could have none, because he is Heir, &co nomine Debitor in the whole, and fo, the Pursuer is only Creditrix there-Replyed, That the superveniency of his being Heir, did not take away the former Right belonging to him, as Bairn; neither did the Death of his two Elder Brothers, who were not Heirs, take away their Right, as Bairns, whose Right, fell to him as Heir to them, the obligation being Heretable and carrying Annualrent, being dated before the Act of Parliament 1641. Duplyed, That the principal Sum was not due to them, they having dyed before they came to the Age of 21 years, and the obligation as to them, was a conditional obligation if they should come to that Age: So that no part of the Sum can belong to them, nor to the Defender as being, Heir:

The Lords found that no part should belong to the Defender, neither for himself as being Heir to the Debitor, nor to him as being Heir to his Brethren, unless he should offer to prove, that they survived the Age of 21 Years: And it being alledged, that one of them Survived that Age, it was found Relevant to make the Sum divide betwixt the

Pursuer and Defender.

In this same Process, compeared, the Executor of umquhile James Pitcairn, who was Husband to the said Isobel: Who Alledged, That what Right she had to the said Sum, it belonged to her Husband Jure mariti, and consequently to his Executors. It was Answered, That the obligation bears Annualrent and was dated before the year 1641, and consequently being Heretable, could not belong to her Husband Jure mariti.

Which the Lords found accordingly, butt prejudice always to him

of any Annualrents owing to her, the time of his Decease.

constitute consensu. fine CLV. Calderwood against Pringle. July 1665.

In the Cause debated the last Winter Session, betwixt Calderwood and Pringle concerning the Contract of Marriage altering the old Tailzie, ac Down cording to the then Interlocutor, the Original Charter was produced, which bearsan clause, that the Vassal shouldnot alienate without the Supe-Instrior's consent, notwithstanding whereof, the former Debeate being resumed. The Lords sustained the Process against the Heirs Male.

Wed-adia

CLVI. Wedderburn against McPherson. July 1665. Equipollent.

Ougal McPherson having fold the Lands of Easter Pourie to Alexander Wedderburn of Kingheny; He is obliged to cause his Wife Subscribe the Disposition, and ratify Judicially, she being Infest in an Annualrent of the principal Sum of 8000 Merks, whereupon Dougal being Charged, Sufpends upon this Reason, That he had dealt with his Wife to Subscribe and Renounce, but she has refused, and so it is factum imprestabile, and the Suspender is content to do the equivalent, viz. To suffer the like Sum of 8000 Marks owing by the Charger to the Suspender to ly in his Hands for his Security, till either his Wife Renounce or she depart this Life. To which It was Answered, That the Suspender being obliged particularly to cause his Wife Renounce, which is a thing prestable in its own Nature, and which his Wife may fulfill if the will, and if the will not fibi imputet galions are who might have advised with his Wife before he came obliged; and there to be come fore, now he ought to fulfill his Bond in forma specifica: And as to the Sunta in forma owing by the Charger, the Suspender stands Insest in the same Lands there specifica fore; So, that the Land is burdened both with that Infeftment and the Wifes also, which Sum, he is content to pay for purging of both Infestments, the Charger being unwilling to have his Lands thus burdened. I. lazzii The Lords found the Letters orderly proceeded, the Charger being ready to make furth-coming the Money.

CLVII. Borthwick against Skeen and Others. Thench placitare.

IN a Reduction pursued at the Instance of James Borthwick Aposthecary Remember in Edinburgh, against Janet Skeen Relict of Home, and Janet Guet barian Home their Daughter, for reducing their Insestment of the Lands of Birk-fneip; The Pursuer declared, he insisted primo loco against the said Janet Skeen, who had gotten a Desence sound Relevant, upon her Liserent Insestment, cled with seven Years Possession in a Removing, and who in this Reduction, Alledges, That she being only a Liserentrix, and the Heir being called, who is obliged to Warrand her Insestment; what Desence is competent to the Heir, is also competent to the Liserentrix; But so it is, that if any were insisting against the Heir, he would Alledge, That non tenetur placitare being Minor. It was Answered, That the Liserentrix is Major; and the Desence non tenetur placitare, is only Personal, and not

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The Decisions of the Lords

Transmissible to a Major; and tho the Minor be obliged to Warrand, box nibil est to the Pursuer, who finding a person Insest in his Lands, and in Possession, may very well pursue, for taking away that Incumbrance, and

fhe may pursue Warrandice, as she will be served.

The Lords Repelled the Alledgeance, and thereafter, she alledging,
That she bruicked by Tolerance of the Minor, qui non tenetur, this
was Repelled also, in respect she had founded her Desence upon a
therefore Liferent Insestment, and in respect thereof, had excluded the Pursuers
a careat to plader Removing. Likeas, her Insestment was produced.

CLVIII. Douglas against Bishop of Cathnes. July 1665.

proban oak of ply. He Bishop of Caithness gives a Ticket to the Deceast Colonel Richard Douglas, bearing, That he granted the Receipt of 40 lib. Sterline from him in Custody, which he obliged himself to Deliver upon Demand; which Ticket being Assigned to Mr. Richard Douglass his Nephew, he purfues for payment. It was Alledged, That in January 1648. the Money being Depositate in his Hand, for Preservation, non tenetur reddere, if it hath perished without the Fault and Fraud of the Defender; But so it is, That in Anno 1648. he living in Durham, his House, was then Plundered, upon the account of the engagement, and the Money also; wherupon he is content to make Faith. It was Answered, That however the Ticket be conceived, as to the granting the Receipt in Custody, yet truely it was borrowed, and the Defender became personally oblig'd to re-pay it; and it is known, that the Army for the engagement, marched not Durham way, but the West way in England; and it is Unreasonable, that the Desender should offer to prove his Defence by his own Oath.

The Lords before Answer, ordained the Bishop to give his Oath upon the way of Consigning the Money, or Depositing it in his Hands; and whether that individual Money was plundered at that

time or not.

CLIX. Mackie against Stewart. July 1665.

Y Contract of Marriage betwixt Umquhile William Stewart Brother to fames Stewart of Burray, and Agnes Shaw his Spouse on the one and other parts; The said William as Principal, and his said Brother as Cautioner for him, is obliged to imploy 5500 Merks upon Security, for the

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the Liferent Right of the faid Agnes, whereupon James McKie as Affigney constitute by her, pursues William Stewart of Maynes, as Heir to the said umquhile Fames his Goodsir, for imploying of the said Sum, the Contract is dated in Anno 1615. It was Alledged, That the Contract, and this Action fell under prescription by the Act of Parliament. It was Answered, That Prescription runs not Contra non valentem agere, Ita est, the Wife stante matrimonio could not pursue, and is in the condition of a Minor against whom prescription fleeps during Minority; and fo it could not run against her, who could not by her felf pursue her own Husband, and though she could, yet she was not obliged to do it. It was Replyed, William Shaw her Father was Party Contracter, and taking burden for her, who in her Name might have pursued for Implement. Answered, That it was not provided by the Contract, that Execution should be used at his instance; and tho it had been so provided, the Father's Negligence cannot prejudge her. Likeas, The Provision in her favours was not to take effect as to the payment of the Annualrent, till after the Husbands death, so that from that time the prescription should only run, and he died, but in Anno 1652.

The Lords found, that the prescription runs only from the Husbands Death, albeit the Act of Parliament has no exception of this

nature in it.

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Being further alledged, That, by the Contract, the Sum is only to be imployed conditionally, the Tocher being first payed. Answered, Though the Contract carry such a Provision, yet her Father, and not she, being obliged to pay the Tocher, it is not her fault, that her Father payed it not. Likeas, if he were pursued, he would say, that the Obligement as to the Tocher is prescribed.

Which the Lords found accordingly.

CLX. Colvil against Lord Balmerinoch. July 1665.

R John Colvil, as Executor to Mr. John Colvil his Uncle, Minister at Kirk Newtoun, pursues my Lord Balmerinoch, for the Stipend of the said Kirk Cropt 1663, the Desunct having dyed in February that Year: And also, for the prosite of the Gleib that Year; It was Alledged, That Balmerinoch had bona side payed it to the intrant Minister, who was presentented to that Years Stipend. It was Answered, That he could not have been legally presented thereto, it having belonged to the Executor, and to the Desuncts nearest of Kin as Ann: And as to the prosites of the Gleib, it is a part of the Ann also. Replyed, That there is no Ann due to the Executor as Executor, but only to the Wife and Bairns where there are any;

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The Decisions of the Lords 114

nor can the profits of the Gleib be due, unless the Gleib had been Sowen. Duplyed, That the Ann is due to the nearest of Kin, who may confirm the

same if they please, and there is par ratio for the Gleib.

Hugbahd & wife

The Lords found the Ann due, and that it might be confirmed by the nearest of Kin, but nothing due for the Gleib, unless it had been Sowen before the Defuncts death: And not being Sowen, the Entrant might lawfully enter thereto, and to the Manse.

CLXI. Stevinson against Ker. July 1665.

donation stanle matrimonio. Here being a Process pursued at the instance of Margaret Stevinson and Thomas Newtoun against Margaret Ker, as Executrix, or Intromissatrix with the Goods and Gear of umquhile William Stevinson her Husband; who was bound, as Cautioner, for Sir Alexander Belshes of Tosts, for payment of 500 lib. contained in a Bond. It was Alledged, That she could not be conveened ut supra for payment, because, she is Executrix Creditrix confirmed to her Husband, upon a Bond made by him to her divers Years before his decease, which was all the Provision the had to live on. It was Answered, That the Bond, being a Donation Stante matrimonio, it could not prejudge lawful Creditors. Likeas, it wants Witnesses, and unless it were proven, that it was truely Subscribed of the date therein-mentioned, it must be holden to have been done, on Death-bed; and it can be of no other force, then if it had been done on Death-bed. It was Replied. That there being no Contract of Marriage betwixt the Parties, and the Defender having brought Means with her to her Husband; it was lawful to the Husband, Quocunque tempore, before his Death, to grant a Provision to his Wife, either before, or. upon Death-bed, for her necessary Aliment, and to supply the want of a Contract of Marriage.

The Lords before Answer, ordained the Defender to condescend what Means her Husband got with her, where, and by whom payed,

Caulianer & prints and how the is able to prove the Payment thereof.

of as losty & full dollar. conjuntly a feal of CLXII. Dumbar against the Earl of Dundie. July 1665.

Y Contract betwixt George Dumbar and Margaret Carnegie, David Carnegie of Craig her Brother, as Principal, and the Earl of Dundie as Cautioner, Soverty, and full Debitor, are obliged to pay to the faid he George the Sum of 8000 Merks; whereupon George Charges the Earl, who

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Suspends upon this Reason, That he is but Cautioner, and not oblidg'd Conjunctly and Severally, and therefore the Principal ought to be fir ft discust. Answered, That he is bound as full Debitor, and therefore there is no necessity of discussing, unless it had been so provided.

The Lords found the Letters orderly proceeded.

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CLXIII. Russel against Cowan.

Bond to pay to price of roind according to condition. cui incumbit probabio of Cowan for pay to be mad powerle Eter Russel and James Gordon, gave Bond to ment of the Price of certain Wines according to Condition (these are the very Words.) The Bond is Assigned to Stephen Douglas, who Charges the Debitors, and they Suspend upon this Reason, That the Bond being Relative to a Condition agreed upon, he is oblidg'd to Condescend upon, & prove the Condition. It was Answered, That unless the Suspenders Condescend upon, and prove the Condition, they must be obliged to pay the ordinary Price of Wine, as Wine then gave.

The Lords found, no Necessity to the Charger, to condescend upon, and prove any Condition, he nevertheless proving the sufficiency of the Wine, the time of the Delivery, and the Price, which fuch

Wines gave the time of the Bond or Delivery.

Blank Bond CLXIV. Telfer against Geddes. November 1665. composition bolived

He Relict of Mr. John Alexander Advocat, being Debitor by Bond to Registration. Samuel Vetch in a Sum of Money, it is Arrested by Patrick Telfer, and thereupon a Summons raifed for making furth-coming, and at Compearance the Debt is referred to her Oath, who Depones and Confesses the Debt, but that she gave the Bond blank in the Creditors Name, and that the knew none other to have Right thereto but the faid Samuel Vetch. Compears Marion Geddes, and produces the Bond Registrat, and her own Name insert therein, before the Arrestment, and thereupon an Inhibition ferved against the Deponer before her Deposition and Oath. It was Alledged for the Arrester, That he ought to be preferred, because the Bond being ab initio the Evident and Debt of the said Samuel Vetch, and being affected with the Arrestment before any Intimation made to the Debitor of infe ting Marions Name (though Geddes her Name had been infert, and that the Bond had been delivered to her before the Arrestment) yet it was of no greater Force, than if the Bond had been filled up in the faid Sa-

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muel Vetch his Name, and had been Affigned by him to the faid Geddes: which Assignation could not have preferred her to the Arrester, unless it had been intimat before the Arrestment. It was Answered, That the Debitor having delivered the Bond blank, no certain Creditor was condescened upon; and therefore till it was filled up, payment could not have been made in whole or in part to any Body, but such as should be insert, and Geddes her Name being insert, and the Bond delivered to her, and Regiftrat before the Arrestment, there being no Law obliging her to make a formal Intimation now, while the Money is still resting, she ought to be preferred to the Arrester, the Debitor not being Debitor to the Arresters. Debitor the time of the Arrestment. The purtland Ray made Seller ville for

The Lords preferred the Arrester. Blank with feo act 29. 8.1696.

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CLXV. Rig contra Beg November 1665.

Rabilis modify of the Declarator of Redemption, in June last, pursu'd by Thomas Beg ahous milling and gainst John his Son. Thereafter compeared Elizabeth Rig Spouse to to the said Thomas, who was insest in the Liserent of the said Tenements for Implement of her Contract of Marriage, and to whom, for Security of her Liferent, the faid Reversion and order of Redemption was Assigned. And it was Alledged for her, That the concurred to the Pursuit. Answered, That she could not concur being cled with a Husband. plonas to pursue where he himself is 2. Her Assignation was not Registrat in the Register of Reexcluded. versions. 3. Her Infestment was not babilis modies, to Transmit the Right of Reversion in her favours, without an Assignation Registrat. Replied, That the Wife with, or without the Husbands Concurse, might Desend and make Good her own Right. 2. A Disposition and Procuratory of Resignation whereupon Infeftment followed, needs not to be Registrat, her Seafine being debite Registrat, at least in the Town of Edinburgh's Books, which is sufficient. 3. Such a Right denudes the Granter of omne jus, and consequently of the Right of Reversion, as has been often found.

The Lords having heard the Cause in prasentia, Sustained the Order at the Wifes instance ad hunc effectum, that she may bruik her Liferent after her Husbands Death, in case she Survived him. 300 stairs.

Homologation : aspociably of other in ferring toLXVI. Skeen against Ramfay. November 1665. Arbara Skeen and Mr. David Thoirs Advocat her present Husband, Anoule & Dursues Sir Andrew Ramfay now Provost of Edinburgh, as Charged

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to enter Heir to the deceast Leiutenent Collonel David Ramsay his Brother, first Husband to the said Barbara; for Implement to her of her Contract of Marriage, whereby he was obliged to Infeft her in Lands worth 18 Chalders of Victual dureing her Life, or to pay her 1800 Merks Yearly. It was Alledged, Absolvitor, because by a Disposition made by him to her, he had Disponed to her the Lands of Graingmoor, acquired by him from the Laird of Ardross, and that in full satisfaction to her of her Contract of Marriage, whereupon the is Infest. It was Answered, Non relevat, unless it were also Alledged, That she has also accepted the Right in full Sactisfaction, which the Defender cannot fay, because the Disposition nor Seasin was never in her Custody, norknew the of it, till the intenting of the Cause; nor can it be thought that ever she would have accepted it, in full Satisfaction, being much to her Difadvantage. Duplied, That she cannot beheard, because Law and Reason must presume, that she did accept it, and that she has homologat the same, because there being nothing in her Contract, but a Personal Obligement to provide her ut supra in no particular Lands; and which Lands above specified, being acquired by her Husbands only about half a Year before his Death; the thereafter entered not only to the uplifting of the Mails and Duties of the saids Lands, but twice sett Tacks thereof to the Tenents as Liferentrix of the same, being so designed in the Tack. As also, After her Marriage with her second Husband, she of new fett Tacks with his Confent; and fo by several Acts of Homologation; has acknowledged and accepted the faid Right; which Lands, with some Moveables, whereto she was Executrix and Universal Legatrix, was all the Estate belonging to her Husband. Triplied, That she might lawfully uplift the Mails, her Husband being obliged to Infeft her in Lands worth 18 Chalders Victual in General, he having no other Lands but these, which cannot infer against her to have accepted the same in full Satisfaction, or any Homologation, she not having known the Alledged Deed to be Homologat. Likeas, the is content to make Faith, the never knew it, and it did remain always in the Nottars hand who wrote it, till it was produced in the Process; Neither was she Accepter of the Seasin following thereupon; or any Actorney appointed by her, the Actorney being a near Relation of of the first Husbands; and if such Fraudulent, Clandestine Deeds should be fultained to prejudge Relicts, they may be very eafily excluded from the benefit of their Contracts of Marriage, whose Case is very savourable, espeacially where they bring large Portions with them, as the Relict did; Nor was this Deed made known, either to her felf, or to any of her Relations. And

And as to her fetting of Tacks, and defiguing her felf Liferentrix, she had probable Reason so to do, her Husband being obliged to Infest her in 18 Chalders Victual; and having pursued this Land, and no other, she might very well call her self Liferentrix, which must be interpret pro tanto, and not pro toto.

Notwithstanding whereof, the Lords sustained the Alledgeance and Duply: And thereaster there being a Reduction raised Super dolo, and in essect Eisdem deductis: And the Cause being heard in Præ-

sentia, the Lords Assoilzied in January thereafter.

cediter Competing. CLXVII. Wa

CLXVII. Watt against Ruffel.

The deceast James Hamiltonn of Boighead, being necessitat to borrow Sums of Money from Robert Russel and Others his Tenents; He provision gave them Bonds, by which he was obliged to repay, and till payment of their Annualrents; The said James being thereafter Married to Jean Watt, she by her Contract of Marriage, was provided to his haill Lands; with Provision, That if she should Survive him, having Bairns of the Marriage, in that case, she should be restricted to part of the Mails and Duties, and the rest to belong to the Children for their Entertainment; The Relict having purfued for the Duties, Robert Russel as Creditor, and having Comprise, compears; And he Alledges, That the Relict must be restricted to the said 5th Sum of

Answered, It was jus Tertii to the said Robert Russel, seing the Restriction was in savours of the Bairns of the Marriage, for their Aliment, which being Alimentar, could not belong to the Creditor.

The Lords found, That the Relict should be restricted butt prejudice to the Bairns one or moe of the Marriage, to Compear and De-

bate for their Preferences.

An only Son of the Marriage compearing: Alledged, That he ought to be preferred, because the Mother being provided to the whole, by her Contract of Marriage, she in the case of existence of Children one or moe of the Marriage, was obliged to restrict her self for their Aliment; which being an Alimentar Right flowing from him, the Children cannot be disappointed thereof, in savours of any Creditor, which Creditors, are in no worse case then if she had had no Children at all: Now if she had no Children, she would Liferent the whole. It was Answered, The Provision in savours of the Children, was a deed of the Fathers, who caust

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Of Council and Session, 1664.

ed draw the Contract in these Terms, and which Provision in savours of Children, could not prejudge lawful Creditors. 2do. The Lands being Comprised from the Son, as lawfully charged to enter Heir to his Father, omne jus he has, is Comprised from him, and consequently the Right of the foresaid Provision. 3tio. It being a Provision in savours of Children in general, there being none but only one, whereas there might have been many; The Lords ought to modify that Aliment in savours of the one. Duplyed, The Provision properly flowed from the Mother, who in savours of her Children, put her self in worse case than if she had none: And though the Lands be Comprised, that cannot prejudge the Childs Aliment; nor ought the Creditor to be in better condition, then if the Child were dead, and sor the same reason, the Aliment ought not to be modified.

The Lords preferred the Child to the Superplus Duties for his Ali-

ment.

CLXVIII. Scot against Boswell. November 1665:

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Awrence Scot Merchant, pursues David Boswell Brother Son to the deceast David Boswell of Afflett, as Successor Titulo lucrativo to his Uncle for payment of a Debt. It was alledged, Absolvitor, because Brothers Son is not Nomen Juris to make him represent his Uncle; not being Alioqui Successurus: Seeing his Uncle might have had Heirs Male of his own Body to succeed to his Tailzied Estate, and that the Desender's Father was next to him, failzieing of Children: So that, in effect by the Difposition, he was but as a Stranger, not being Appearand Heir, nor otherways to succeed, if the Disposition had not been made. It was Answered, That the Estate being Tailzied, and provided to the Defender, who was Eldest Son of the Defender, who was Eldest Son of the Defender Brother, the only then next apparent Heir of Tailzie; it was equivalent, and alike as if it had been disponed to the Brother himself: And it was found, in a case of the Lady Smeiton, against her Son this Laird of Smeiton; That a Disposition of the Estate made to him by his Grand father (his Father, who was Successurus for the time being on Life, made nevertheless the Replyed, That the case adduced was in Linear Oye liable as Succeffor recta, where none should succeed but the Son or Oye, which is not in this case, for, Afflect might have had Sons of his own Body; so that neither Brother, nor Brother's Son could be faid to be alioqui successuris.

The Lords found, the Brother's Son, not to be conveenable as Succession, in respect, the Disponer might have had Succession of his owns

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The Decisions of the Lords

Body, Butt prejudice to the Pursuer, to impugne the Disposition as being made to a Conjunct Person, in prejudice of Creditors.

CLXIX. Fohnstouns against Tounger November 1665.

Ean and Beatrix Johnstouns, being Infest in an House in Edinburgh, as Heirs to the deceast Robert Johnstown their Father, who was infest, upon the Refignation of Thomas Lawrie, who had Right from Robert Johnstoun Elder, who had Right from Patrick Porteous of Haukshaw, who was Infest as Heir to Leonard Porteous his Uncle in Anno 1608. pursues a Reduction, Improbation, and Declarator of Property against William Tounger, to hear and see it Found and Declared, That the Pursuers, have the undoubted Right of Property to the faid Tenement to which William Tounger, alledges Right from Stenilans Porteous, who is Infest as Heir to the said Leonard, and which Infeftment, and Service of Stendaws, was past by a Procuratory granted by him to the faid William, who likeways purfues the like Action, against the saids Fean and Beatrix; The Question being, whether the faid Patrick, or Stenilawes Porteous, be the true Heir of Leonard: The Reason of Fean and Beatrix their Reduction being, That Stenilaws Right as Heir, was prescribed not being pursued within Fourty Years. It was Answered for the said William Tounger, That Stenilaws Right did not prescribe, because there is a Liferenter yet Living, viz. Catharin Thorbrand Relict of the faid umquhile Leonard, who was infeft by her Husband, and all this time in Possession; so that the Prescription, could not run during her Right and Possession: But on the contrary, her Possession, must be interpret to be Stenilaws Possession, being the Righteous Heir, and not the said Patrick's, who, in Anno 1608, was furreptitiously served To which it was An-Swered, That Patrick being served, and infest Heir, in Anno. 1608, the Posfession of the Relict, must be interpret Patricks Possession, and consequently the Pursuers and their Authors, Patrick being declared Heir; and nothing being done by Stenilaws, till the Year 1655, long after Fourty Years.

The Lords found, That the Relicts Possession should be interpret the possession of the Heir, who shall be found the lawful and righte-

ous Heir: And therefore finds the Alledgeance Relevant.

Thereafter, It was Alledged against William Toungers Reduction, That it is prescribed upon that Clause contained in the Act of Parliament 1617, whereby it is declared in general, that all Actions upon Bonds, Obligations and others shall prescribe not being pursued within Fourty Years.

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which it was Answered, That the foresaid Clause relates only to personal Actions upon Bonds and sicklike, and not to Retours and Reductions thereof, whereupon Infestment follows, to which only the first part of the Act of Prescription relates. Replyed, That the general Clause bearing and others must be extended to Retours, as well as to personal Actions; which if they be not intented within 40 Years, at the instance of an other more lawful Heir, prescribe also.

Which the Lords found accordingly.

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But thereafter, it was Alledged for Stenilaws, That he was Minor, for as many Years, as made the Prescription sleep and not run out.

Which the Lords found Relevant.

Nota. In this Cause the Act of Prescription of Retours by 20 Years, was not found to have place in this Case, in respect Leonard dyed before the said Act; which is only made ad futura. Neither the old Act of Prescription of three Years, which runs not against Persons out of the Countrey; and consequently not against Stenilaws, who all this while has been in Poland, and his Father also, who was alledged to be the nearest Heir to Leonard.

CLXX. Campbel against Beatton December 1665.

Jahrbellion. Octor Beatton having gotten from William Blair of Balgillo, a Wad- Lard fold fet of the Lands of Camno, redeemable upon 8000 lib. Thereafter they Subscrive a Minute for the irredeemable Right, for which the Doctor was obliged to pay 35,200 Merks, including the 8000 Pound. Balgillo as Cantioner for the Master of Gray, being Debitor to Mr. James Campbel in 2400 Merks, Mr. James servés Inhibition against Bagillo, in August 1658; and in September thereaster, Arreasts in Doctor Beattons hands, all Sums due by him to Balgillo: In February 1660, there was a tripartite Contract betwixt Balgillo, Doctor Beatton, and Mr. John Smith, whereby, the faid Lands are irredeemably Sold to the faid Mr. John Smith, and the Minute is Assigned by Doctor Beaton to him. Upon the Arrestment used in the Doctor's hands, there was a pursute moved against the Doctor, to make forthcoming, and referred to the Doctors Oath, who having Deponed, That he was not Debitor to Balgillo, in respect the Minute was past from, he is Assoilzied in respect of his Oath. And thereaster, Mr. James intents a Process against the Doctor, Ex capite doli: Bearing, that the Doctor by the Minute was Debitor to Balgillo, and that notwithstanding

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ing thereof, he had disponed the Minute to Mr. John Smith, not only to make void the Arrestments, but also to make his Inhibition served against Balgillo ineffectual, whereas, if he had not Affigned the Minute, but Discharged it, in favours of Balgillo, then Balgillo could not have Sold the Lands, but with the hazard of the Inhibition; and consequently the Doctor, has dolo malo frustrat the said Mr. James his Diligence: And to make it the more clear, he offers to prove, that the Doctor took fecurity, by Bond and Cautioners, from Balgillo, for warranding him from hazard of the faid Inhibition and Arrestment. swered, That, by the tripartite Contract, the Doctor was not an irredeemable Disponer, but only in effect consenter with Balgillo, the irredeemable Right never being in the Doctors Person, but only by the Minute, whereupon nothing followed; and the only reason why he Assigned the Minute was, because he had the redeemable Right, which he was to Assign to Mr. John Smith, and for which he only received the Sums contained in the Wadfet wherein there was no Dole; feeing the Inhibition could not affect his Wodfet, nor hinder him to refile from the Minute; and the Pursuer may make use of his Inhibition, against the said Mr. John Smith. Replyed, That the Inhibition indeed could not hinder the Defender to relie; but he was in dolo & culpa to Assign it, to render the Pursuers Diligence ineffectual, and the Pursuer is not obliged to pursue Mr. John Smith, ex capite inhibitionis: But the Defender, may pursue his Warrandice against Balgillo and his Cautioners. man & woman Strand The Lords fullained the Summons.

The Lady Bute against her Son.

Ame Grissel Campbel, Relict of the Sheriss of Bute, after she was Contracted in Marriage, with Mr. Archbald Grahame, now her second Husband, and after she was Proclaimed with him in the Paroch Kirk, granted a Renunciation of a part of her Liferent Lands, in savours of her Son this Sheriss, (the rest Unrenunced being but very mean) whereof she with consent of her Husband, intents Reduction upon this Reason, That she could do no Deed, after she was Contracted, and Proclaimed, without her Husbands consent, no more then if she had done it the time of the Marriage.

Which the Lords found Relevant, notwithstanding of any thing alledged to the Contrair: And specially, That her Husband, before the Solemnization of the Marriage, knew of the granting of the Resunciation, and said nor did nothing against the same.

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CLXXII. Dickson against Sandilands. December 1665. And thereafter renewed in January following.

Rollitton against Sandilands. December 1665. And thereafter renewed in January following.

N the Contract of Marriage betwixt Mr. Alexander Dickson of Kilboche, pince of land with consent of John Dickson of Hartrie his Father, and Isobel Sandi- month of of father Sandilands of Hilderston her Father, beside with E. lands, with consent of Joynture Lands particularly provided to her her Husband is obliged to pro- oalfof wet. vide her to all Conquest Lands; and he having during the Marriage acquired roller. the Lands of Mitchelbill, the in the Englishes time, pursued her Son as Heir, Swanger. and obtained Decreet against him, to infest her therein: Of the which De-authofflet creet there being a review and Reduction intented before the Lords upon this reason, That the English Judges had repelled a Relevant defence, viz. That the Defunct, having acquired the Land a little before his death, the price thereof was borrowed from John Kello the time of the Acquisition: whereupon he gave Bond bearing, that the Money was borrowed to pay the Price, containing an Obligement to infeft him, not only in the faids Lands acquired, but in certain others for an Annualrent to be payed furth thereof: This Alledgeance being refumed in the review, and it being added. that her ownFather, who was party-Contracter with and for her, was Witness Subscribeing in the Bond; and it was offered to be proven that the Bond was granted the very day of the fubscribing of the Alienation, at least within a day or two after: And a Practique betwixt this Renton Lord Justice Clerk and his Mother was repeated. To which It was Answered, That the Obligement provideing the Conquest is simple, without Condition or Burden, and in case of Conquest, a Wise is as savourable as an Heir of Conquest, who would fucceed to the Conquest Lands, albeit the Heir of Line behoved to relieve him of the Debt contracted for the acquireing thereof, the Executor also would be obliged to relieve him thereof: And the Practique meets not; because there, the Money was due, by Bond, to the Seller of the Land for granting the Alienation, which is not in this case, the Money being borrowed from a third Party, which was the reason of that Decision. Replyed, When the case of an Heir of Conquest shall occurr, the Lords will consider of it, whether it be alike with the Relict or not: But as to the Relict, she is no ways to be favoured as to the general Clause of Conquest, the being more then sufficiently provided aliunde, and more then effeirand to any Portion that she brought with her: And Law and Reason allowes, that Lands acquired should be cum onere of the Price.

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The Decisions of the Lords 124

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The Lords found the Reason of Review Relevant: Thereafter it was offered to be proven by John Kello's Oath, That a part of the Money was owing to him, before the acquiring of the Land, which the Lords would not Sustain to take away the Clause exprest in the Bond, and to which her own Father was Witness: foor Nub. Docig. p. 5.

Marrandico Slands. Infostment fast CLXXIII. Broun against Vetch and Others. January 1666.

THe Earl of Traquair, having Feued to Umquhile Mr. James Lawson and Elizabeth Broun his Spouse, the Lands of Inglistoun and Maidenbead, and the Lands of Fingland in Warrandice, by an Infeftment holden of himself; They did possess the principal Lands many Years, till of late Sarah Cockburn, Spouse to Mr. Patrick Gillespie, upon a Prior Insestment of Annualrent, has gotten a Poinding of the Ground for an Annualrent exhausting the whole Duties of the Principal Lands; whereupon, Elizabeth Arrests the Rents of the Warrandice Lands, in the Hands of Richard Vetch Tenent, and pursues to make Furth-coming; Compearance is made for Fohn Scot, who is Assigned to the Duties by John Stewart, who stands publickly Infeft in the Warrandice Lands; And Alledges, That he ought to be preferred, in respect of his Publick Right, and cled with Possession; whereas the Pursuer's Right is only base, holden of the Granter, and not cled with Possession It was Answered, That the Alledgance ought to be Repelled, and the Publick Infeftment cannot be Obtruded against a base Insestment of Warrandice, though not cled with Possession of the Warrandice Lands, because there could not be a Title for Possession of the Warrandice Lands. until the Principal Lands were Evicted; but in the mean-time, the Principal Lands being possest, makes in effect the Infestment of Warrandice to be cled with Pollession thereof; just as an Infestment of Warrandice Lands doth not Prescribe, but from the Eviction of the Principal, and a base Insestment, being of its own Nature a legal and valid Investiture, wanting no Solemnities, though not fo Soveraign as an Infeftment holden of the Superior; it ought not to be Invalidat for want of Possession; which for the time it was not possible to attain to; the Pursuer immediatly after the diffress, doing all Diligence for Possession; especially considering, That since the Act of Parliament was made for the Registration of Scasins, acquirers of Land may alse-well come to the Knowledge of base Insestments, as Publick, by the Registers. It was Replied, That by our Law and Practique, there is no difference betwixt Infeftments of Warrandice and Others, but Indi-Stincte

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flincte, a base Insestment is post-ponned to a Publick (being specially Year and Day in Possession) and if this were not Sustained, then Insestments given to Cautioners for their Relief of Debts, though base, should be preferred to publick Infeftments, though not cled with Possession till a Distress. Likeas, The procurer of a base Insestment, might have helped himself, and caused the Disponer Insest him holden of the Superior, or otherways. not to have purchased the Principal Lands, or might have raised a Declarator of his Right of Warrandice, or Intimat the same to the Tenents, which would have made it equipollent to a possession, before Eviction. Duplyed. That the Pursuer opponed his Infestment, and Reply; and added, that the Principal and Warrandice Lands were within the body of the famen Difposition, Charter and Seasine holden of the same Granter and Superior. neither can any Man be blamed to acquire a Feu or Infestment of Lands to be holden of the Granter being Superior, tho he be but a Sub-vassal, and his Few not so noble as the principal Vassals is, yet he is a lawful Vassalby a lawfull and valide Right: And if no fault can be imputed to him, by taking the principal Lands so holden, no more the Warrandice which succeeds in the place of the Principal, both being in one Infeftment, and in one Barrony, at least by Annexation.

The Lords having heard the Matter in their hail presence, Sustained the Infestment of Warrandice. Nota, Though they thought there was a difference betwixt Infestments of Warrandice of this Nature, and Infestment of Warrandice for relief of Cautionry; yet if that had been the question, I know not what Decision they would have given.

This is amended by act. 13 Part. 1693 . 800. NISS. Dois. p. 7.

CLXXIV. Cranstoun against Pringle. January 1666.

In a Suspension pursued by William Cranstoun against Walter Pringle of equivalent:

Stitchel, as Commissioner for Walter Pringle of Greenknow, for a BloodWit; wherein the said William Cranstoun, was amerciat by an Inquest of
Greenknow's Tenents: Compeared the Sherist of Berwick, and alledged, That
Greenknow had no Power to hold Courts for Bloods; because he was not
the King's Free Baron of the Lands where the Blood was committed, being
only a Feuar to the Marquis of Huntly. It was Answered, That he was infest by the Superior the King's Barron, cum Curiis & Bloodwitis, which
was equivalent as if he had been Heretable Bailie, constitute by the Superior; and which Clause gave him a Liberty of Courts, and a Right to
Bloods, when he was the first Attatcher, before the Superior, or Sherist.

The Lords preserved the Vassal.

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CLXXV. Ramfay against Wilson January 1666.

Molonel Cuninghame, gives in custody to the deceast Mr. James Aikenhead, certain curious Jewels of a confiderable value, conform to an Inventar under Mr. James his Hand: Thereafter the Colonel goes for Gerund acquille many, and being there, draws some Bills upon Mr. James, who answers them accordingly. The Colonel dies, and the Jewels remain in Mr. Fames his hands all this time: Mr. James, assigns the Bills to John Ramsay his Brother-in-law, who gets the keeping of the Jewels also; and a Bond granted by him and Mr. Robert Byres, for the Colonel's use, to make them furthcoming. After the in-coming of the Englishes, John Ramsay having hid the Jewels in a Coal-cellar in his House at Edinburgh, the said Mr. Robert deals with the Damsel of the House, and gets the Jewels, and carries them North with him: And after the Englishes were settled, he returns and keeps still the Jewels, till after several Years, Mr. Robert being become very Necessitous, he did impignorat divers of the Jewels to James Wilson and others; and before he Redeemed them, he died. The faid John Ramfay, by his Assignation granted to him by Mr. James Aikenhead his Bother-inlaw, to the Colonel's Bills, confirms himself Executor-creditor to the Colonel, and pursues the Havers of the Jewels, to make them furth-coming to him. It was Alledged by James Wilson, That he should be Associated, because the Jewels having been in the Possession of the said Mr. Robert Byers for many Years, it was lawful for the Defender to take them as pled-hot ges for Money lent to him, his peaceable and unquestionable Possession of fuch Moveables, giving him fuch a Right as might make any Man bona fide to buy or block for them; just as for Houshold stuff, or any other furniture, which are not in use to be Sold in publick Mercats: And in the Law, there is Usu capio in mobilibus, which, after so long a time, establishes a Right in the possessors person. It was Answered, That the Jewels being ab initio intrusted in the hands of Mr. James Aikenhead for Custody, and the truster having thereafter dyed out of the Countrey, and Mr. Robert Byers his Intromission therewith being vitious, as having Viis & Modis gotten them out of John Ramfay's Possession, and which by a Missive Letter under his hand, he obliges himself to make furth-coming; which instructs, that Mr. Robert was never owner of them and no power to dispose upon them, by pledging them or otherways; But having done it, it is proper rei vindicatione for the Colonels Executors to pursue for them, even after so long a time, there being no Prescription run by the Law of this Counwa wa fa fei pr G

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And though the Jewelshad gone per mille manus, the haver al ways is liable, who should know better the condition of the party he deals with: And the reason why the said John Ramsay did not insist against the faid Mr. Robert Byers, was, because he feared the Englishes should have seized upon them, if he had pursued for them. Likeas, the Defender cannot pretend a bona fides, in taking them as pledges, as Mr. Robert Byers his Goods, because, they were so curious, and of such a quality as it could not be prefumed that Mr. Robert could be Owner of such Jewels, he not being a Jeweler, nor ever a Trader with Jewels; whereas the Defender might have had some Reason for him, if the Jewels had been such as Men of Mr. Robert's quality are usually Masters of.

The Lords Sustained the Summons, and Repelled the Alledgance.

CLXXVI. Montgomery against Stewart. January 1666.

IN a Process pursued at the instance of Colonel James Montgomery and his chief Horning Lady, against her Brother, The Lords found, that an Heretable Bond became Moveable by a Charge of Horning used against a Cautioner, though the Principal was not Charged; and that there was no necessity to use Requisition, tho the Sum was eiked to the Reversion of a Wodset, in respect the Bond appointed Execution to pass without Requisition.

Clapertoun against Torsonce. January 1666. Comprising

Here was a Comprising deduced at the instance of the Laird of Torsofice, accomplate I or James Brown of Colftoun to his behove, of the Lands of Willicleugh, against Ramfay as lawfully charged to enter Heir to the deceast Sir George Ramfay of Wyllicleugh his Father, and George his Brother, in June 1616i. After 1661. which there was a fecond Comprising led within 14 days, at the instance of Mr. Alexander Kinnier, to which, Mr. George Clappertoun having Right, used an order of Redemption of the first Comprising against Torsonce and others having interest, before Whitsunday 1664, to which term the legal Reversions of all Comprisings whereof the legal was not expired in January 1662, was prorogate by Act of Parliament 1661. And now he craves, that the order may be declared; and that the first Comprising, may be found satisfied, either by Disposition made by the first Compriser of some of the Lands, the worth whereof, doth far exceed the Sum due by the first Comprising, and by his Intromission with the Rents and Duties of the Lands within the years

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of the Legal, as it is now prorogate. It was Answered by Torsonce, That the Libel is not Relevant, unless the Pursuer would alledge, That the Com prising was satisfied within 7 Years after deduction thereof: for by the Law then standing, after the expiring of the Seven Years, the Lands became his irredeemable Property, and it was thereafter, lawful to him to difpose thereupon at his pleasure. Likeas, though he did dispone the Lands of Wyllicleugh, to the appearand Heir for 11000 Merks, and did retain the Lands of Kippilaw, for making up what he wanted of the Sums comprised for; yet the late Act of Parliament, can only be extended against such first Comprifers, who has the Right standing in their Person for the time, and not against such, who, after expiring of the 7 Years, had, disponed the comprifed Lands before that Act. 2. Any Intromission the Compriser, or any others having Right from him had, before the said late Act of Parliament, and after the saids 7 Years, being of the Rents bona fide uplifted and confumed, as his own by the Law then in force, he cannot be comptable therefore. It was Replied, That the Prorogation granted by the Law to Whitfunday 1664. is without any distinction of Comprisings, and is to have all the effects, as the Comprisings and legal Reversions would have had, if the Legal had not expired before the same Term to which they were prorogat, being dated 7 Years only before, according to the former Law: So that whatever Sums of Money, or Rents, the Compriser, or any having Right from him, has uplifted, and what Lands have been Disponed for the Price, they are to be Comptable therefore, and the Lands to be redeemable; and the Price payed for the Lands, is to be compted also, and if it be not satisfied by the Desenders Intromission, the Pursuer may be liable pro tanto, in place of the Sums Comprised for in the first Comprising: And upon the same ground of the Prorogation, the Defenders ought to Compt for the Rents as well after, as before the expireing of the legal by the former Law.

The Lords found the Comprising redeemable, notwithstanding of the foresaid Disposition, and the Compriser is to be satisfied of 11000 AirA Coffice. CI VYYIII. Merks to be allowed always in part of the Sums Comprised for, and

Lord Justice Clerk against the Fewars of Colding-CLXXVIII. hame. January 1666:

by rundah . He Lord Justice Clerk, and his Predecessors, being insest in certain not of taining do leit. Lands, together with the office of Forrestery, within the Abbacy

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and Lordship of Coldinghame, and in certain Duties yearly, namely, a Threave of Oats, out of every Husband Land for the Office; pursues a Declarator of his Right against his Vassals and Tenents, and for payment of the Duties bygone, and in time coming. It was alledged, by some of the Vassals, That they ought to be Assoilzied, because, they and their Predecessors, were Infest by the Abbots of Coldinghame, lawfully confirmed conform to the Law, in their Lands, free from any fuch burdens: Whereas, any Infeftments granted to the Pursuer or his Predecessors, were either posterior to theirs, or if prior, they were not confirmed before the Defenders Predecessors their Infestments were confirmed. To which the Pursuer Answered, and opponed his Predecessors Infestments cled with Possession, at least whereupon he, and his Predecessors, had from time to time used Citations. and done Diligence against the Vassals, so that his Right is not prescribed: And there is no necessity to say, that his Predecessors were confirmed. Imo. Because, the Lands and Office held, of old, Waird of the Abbot, and there is no necessity of Confirmation in Waird holdings. 2do. Tho that they held Feu, yet this being an Office, no Act appoints Confirmation of Offices, which, even without Seafines, may be granted and transmitted, but only of Feu Lands.

The Lords found, no necessity of Consirmation, upon both the Grounds foresaids, or either of them. This is not obs. by Stain

In the same Process, tho there had been many Summons raised, as in Anno 1600, 1621, 1627, &c. yet the Lords would not sustain Process for any By-runs, but only, fince the Wakening now infifted upon was last raised, which was only, within these Three or Four Years: In regard, he nor his Predecessors, had never been in Possession, at least since the intenting of the faids Processes, and had never obtained any Decreet. This is not in Stair collochon.

CLXXIX. Hay against Ogstonn.

Jutor. saltoras His pupil. R. Francis Ogstoun, Servitor to the Lord Advocate, having died, and having left a Legacy to Mr. John Hay, Servitor to one of the Clerks of Session, who lived not long after him: And there being withal, an alledged Bond, granted by the faid Mr. Francis to the faid Mr. John, for 1000 Merks, which he affigned to John Hay his Son; The faid John Hay, with concurse of John Hay Writer in Edinburgh, his Curator, and which Curator is also Executor to the said Mr. John, pursues Jean Og stown, Sister and

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and Executrix to the said Mr. Francis, for payment; Who Alledges, That she having but lately come to Edinburgh, after the decease of her Brother, and of the said Mr. John Hay, her Brother's Papers were delivered to her as Executrix, by the same Pursuer, who is Executor to the Father and Curator to the Son, and that, without mention of any Bond granted by her Brother to the said Mr. John; but on the contrary, it is unlikly he would have lest him a Legacy without mentioning the Debt, that it might be known, whether the Legacy was by and attour the Debt, or in satisfaction thereof: And therefore craved, That the said John might ante omnia give his Oath, whether or not, this Bond was retired by Mr. Francis in his own time, as satissied, and sound amongst Mr. Francis Papers, and what he knows anent the payment thereof, in whole or in part, before Mr. John assigned the same to his Son.

Which the Lords found Reasonable, notwithstanding it was Answered, That his Oath could not prejudge the Minor who is Assigney: Reserving the Consideration of what the Oath should work, the time

of the Advising.

CLXXX. Campbel against Stirling. January 1666.

no multion Chibald Campbel of Ottar, by Contract of Marriage, and Infeftmentfollowing thereupon, did provide Anna Stirling his Spouse, to the Lands of Kinnaltie, by Charter, carrying cum molendinis & Multuris: At this time, there is no Miln upon the Lands, but during the Marriage he builds one, and after his death the Relict possesseth both Lands and Miln; whereupon. she and her present Husband, and Tenents, are pursued by this Ottar, for the Duties of the Miln. It was Alledged, Absolvitor, because the Miln was built, upon the Husbands Lands, which she Liferented, being Insest cum molendinis, and adificia built by the Heretor cedunt solo, and consequently to the Liferenter. It was Answered, That Milns, being Inter Regalia, are not transmitted without an express Disposition and Infestment, and the general Clause of a Charter cannot do it. Replyed, That the general Clause gives her good Right, unless there had been a going Miln, the time of the Infeftment; in which case, it might have been questionable, unless the Lands and Miln had been ere ted in a Barrony, but where there was no Miln, and a new Miln is built, the Miln accresceth to the Liferenter during the Liferent, as well as if she had built it her self after her Husbands death.

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Which the Lords found accordingly: Withal the Lords declared, That if after the building the Miln her Husband did Thirle any other Lands thereto beside her Liferent Lands, that she is not to have the benefite of any fuch Restriction.

> Ellis against Keith. CLXXXI.

Wife by her fraile matrimon in John Britism R. William Wishart Parson at Leith, and Elizabeth Keith his Spoule, and By Tock. gave Bond to Mr. John Ellis Advocat, for 6000 Merks; where- disp. of lands. upon he uses Inhibition against them, they being dwelling at Leith for the and splend time, and the Inhibition is used against them legally where they Dwell, and at the Mercat Cross of Edinburgh, but before it could be served at the Head-Burgh of the Mearns, where their Lands lay, the very next Day, they Dispone the Lands of Netherbenzolm, whereof the said Elizabeth was Liferentrix, to Mr. Alexander Keith her own Son-in-law for 50000 Merks, whereof 10000 Merks he was to retain for his own Tocher, 26000 Merks was to be payed to Creditors; and Mr. Alexander gave an Heretable Bond, for the Superplus 14000 Merks, to the faid Elizabeth, which Sum she uplifts. and imployes a part thereof, upon the Lands of Brotherton, in the Hands of Francis Keith; the Right whereof, she Assigns to Jean Wishart her Grand-Child, without an Onerous Cause; whereupon the said Mr. John Ellis purfues an Action of Reduction ex capite doli, as well as upon the Inhibition. to hear and see it found, That the said Sum was a part of the Price of the Lands, disponed by the said Elizabeth, after the Inhibition was intimat to herself, and that she was in mala fide, in prejudice of the Pursuer, being a lawful Creditor, thereafter to uplift the Price to Imploy and Assign it to her Grand-child; and that it should be declared, that the said Sum should be affected with the Pursuers Debt by Comprising, or any other legal Diligence. It was Alledged, That the Bond made by the faid Elizabeth with her Husband, to the faid Pursuer, was Null, in so far as it might be Obligatory against her, because it was subscribed by her stante Matrimonio, during which time she could not oblige herself. It was Answered, That albeit the Bond was Null, in fo far as concerned the Obligatory part to Pay; yet in so far as it contained an Obligement to Infest in an Annualrent, or Procuratory of Resignation, it was Valid and Sussicient against her; just as the, being Heretrix, might with her Husbands Confent dispone the Lands Irredeemably, or any Annualrent furth thereof. Likeas, The Bond bears a Clause for resigning an Annualrent. Replied, That the Debt not being

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her own, but her Husbands, the might lawfully dispone the Lands, whereof the was Heretrix, before the Inhibition was compleatly served against her at the Mercat Crofs where the Lands lay; specially, seing the Price was applyed for the Payment of just Debts, except what was Assigned to her Grand-child, for her necessar Provision. Duplied, That Elizabeth having fecured the Pursuer by a Disposition and Obligement to Infest and Resign ut supra, she could do nothing to her Oye, a Conjunct Person, without an Onerous Cause to prejudge him, though there had been no Inhibition served, far less after Inhibition intimat to herself, though not execute at the head Burgh where the Lands lye.

The Lords Repelled the Alledgance and Reply, in respect of the An-

fwer and Duply. Por Nybot', Drigions. p.4.

CLXXXII. Lord Lee against Porteous. January 1666.

wadgett Sdilion of selsion. ad 19 9.1449. TN Anno 1612. John Smeitoun of That-ilke, Wadset the Lands of Tintoside ad: 62. 9. 1661. to Thomas Porteous under Reversion of 2000 Merks, and a three Years Deructios. Tack after the loofeing, for payment of 100 Merk Yearly; The Barrony of Smeitoun, with the Right of this Reversion, comes in the Person of the Laird of Lamingtoun, who Dispones the same to the Lord Lee, who uses an Order of Redemption, and pursues a Declarator, having configned the 2000 Merks, and produced the famen at the Barr. It was Alledged for the Defender, That there could be no Declarator, unless a three Years Tack were also produced conform to the Reversion. Answered, That by the 19 Act 6 Parl. K. Ja. 2d. it is statute, That Tacks of Wodset Lands set after Redemption, for halfMeal, or nearby, hould not be keept, unless they were fet for the very Meal or worth of the Lands, or near the same: But so it is, that this Tack is appointed to be set for 100 Merks, the Lands being worth 300 Merks or nearby, and the time of the Wodset, when the Money was at Ten Per Cent. they could not be less then the Annualrent of the Money then lent, which was 2000 Merks, and confequently they behooved to be at Heast 200 Merks yearly, and therefore the Tack is null. 2do. By the late Act of Parliament betwixt Debitor and Creditor, it is appointed, that the Creditor having a proper Wodset, and getting security for the Annualrent during the notRedemption, he shall either quite the Possession, or otherways if he please to possess, he shall be comptable for the Superplus Duties, more then payes the ordinar Annualrent: And therefore, when the Creditor is, by Redemption, payed of his principalSum; so that no moreAnnual-

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rent is to be due, he should have no more Use nor Advantage of the Lands and yearly Duties thereof; and therefore a paritate rationis, the Tack To the first it was Replyed, That the Act of Patliabecomes Null. ment has been in continual desuetude, and Tacks of this nature after the loofing, were always keept and configned the time of the Redemption, as may be instructed in diverse cases. It was Duplyed, That where the Law stands clear, no desuetude can be alledged against the samen, unless it can be made appear, that this Objection has been made against such Tacks, and has been repelled. Answered, That such Tacks were never contraverted, and so never objected against. And who can know, after so long a time, whe-St ther or not Objections were founded against the said Act, and what the Reason has been to repell them, if they have been proponed; whether the Act was interpret to extend only to Wodsets and Tacks dated before the Act, and not to after Wadfets and Transactions. To the second Answered. That the Act betwixt Debitor and Creditor, speaks nothing of the case of a Tack after loofing, and so cannot be extended a paritate rationis.

The Lords found the Tack null upon the Act King James the Second, the some were of the judgement it should have been found not upon that Act, but upon the late Act betwixt Debitor and Creditor.

CLXXXIII. Duke of Hamiltoun against Laird of Strichen. Shorist Roufar complable for February 1666.

who was Sheriff of Innerness, for payment of some Terms Taxa- heir tion resting before 1638, who Suspends upon this reason, That by the Act while to Parliament 1663, the Sheriffs are only obliged to bring in the Taxation, The being charged under the pain of Rebellion only; and without any Certifica-conficuration, that they are to be liable thereto themselves, unless they did uplift the same famen. And it were very hard, to make an Annual Sheriff, such as Strichen was, to be otherways liable, and tho he had been, yet no Diligence having been done against him in his own time, his Heir after his death, and after so long a time ought not to be liable for his fault, unless he had been sucratus by it: And the Suspender, of his own consent, is content to be comptable for what his Father intrometted with, and what he did not intromet with, is debitum sundi, and may be recovered yet.

The Lords found thereason of Suspension Relevant.

CLVXXXI.

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Ships. customs.

Dumbarton.

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The Decisions of the Lords

CLXXXIV. Cuninghame against the Legators of his Wife. February 1666.

wife go of moveables. Gnes Houie Spouse to George Cunninghame, by her Testament, Nominats her Husband Executor, and leaves some Legacies to friends extending to 1000 Analogo. Merks, her Husband confirms the Nomination, in which the free Gear and the confirm flot Defuncts part thereof did far exceed the Legacies; and yet he intents a Reby and a duction of the Testament as it is confirmed, and a Declararor, that he may be free of the Legacies in respect of a Debt owing by the Pursuer himself, before the Defuncts decease, and still owing the time of the Confirmation. It was Alledged for the Defenders, Absolvitor, because, the Confirmation being his own Deed, and the Inventar given up by himself, by which his Deed, he has constitute himself Debitor in the Legacies, he cannot, upon a Debt of his own, liberatehimself from the Legacies, nor quarrel the Confirmation; unless it were an emergent Debt, owing by the Defunct Testator her self. Answered, That the Husband has Liberty, in the Wifes confirmed Testament, either to give up, or not give up, his own Debt, for exhausting the Inventar, and his Wifes part : And therefore he not having given up this Debt, he may, quocunque tempore, exhaust the Jast Inventar therewith. Replyed, That he having priviledge to give up, and exhauft with his Debt, and being Executor Nominate by his Wifes Testament, wherein the appoints the Legacies to he payed; he becomes Debitor of the Legacies by his own Deed, and by omitting to make use of that priviledge, which was due to him, viz. the upgiveing of his own Debt, thereby to exhaust the Inventar, but specially this Debt, which could not but confist in his knowledge, the Bond being Registred not long before the Confirmation, and being charged thereupon not long after.

The Lords found the Alledgeance and Reply Relevant, in respect of his knowledge of the Debt, unless he would condescend upon, and make appear some probable reason of ignorance, or why he did not confirm the samen. This cause was again heard and considered in February and June thereafter.

June this Interlocuto was Adher'd to; tho in February it went otherways but at that time the knowledge of the Debt was not considered.

CLXXXV. The Town of Glasgow, against the Town of Dumbartoun-February 1666.

N the Mutual Process betwixt the Town of Glasgow and the Town of Dumbartoun, wherein there had been a very long Debate.

The Lords found, That the Charter granted by K. Ja. the 6. to the Town of Dumbartoun Anno 1609. containing many particular Customs, of all Ships arriving on the Water of Chyde, and namely, within the Stations

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of Portrige, Inchgreen, and New work, could not prejudge the Town, nor Burgesses, of Glasgow, being a free Burgh Royal, and the River being flumen publicum; where, upon the naked Account ofp affing up and down, Anchoring, or Transporting their Goods, out of their Ships, by Boats to Glasgow; no fuch Dues ought to be exacted to their prejudice, and are only, to be exacted in Harbours, ad sustinenda onera of the Harbour; And altho Dumbartoun, has been in Possession, ever since, of most of the Dues, yet the Lords found their Possession, from time to time interrupted, via facti, and viajuris allo. Jakile like

CLXXXVI. Scot against the Heirs of Afflect. June 1666. Avid Boswel of Afflect, by Contract of Marriage with his first Lady, being renunce bole obliged, in case their should be no Heirs Male, but Female, of the Mar-Rein. riage, to provide them to certain Portions. Lawrence Scot, as Creditor to the deceast Afflect (having left only Daughters) pursues them and their Husbands. as they who have Renounced to be Heirs, yet have gotten Satisfaction, from the Heir Male, of their Portions provided to them, at least received Sums of Money, from the Heir Male, and that for no other Cause, but for granting the Renounciation. It was Alledged for the Daughters and their Husbands, Absolvitor, because they Renounce to be Heirs, and any Receipt of Sums of Money by them in manner lybelled, cannot import Behaviour as Heir, by the contrair, their express Renounciation takes away any Presumption, & animum immiscendi, and as to the Receipt of Sums, Non Relevat, (and it was lawful for them to receive Sums, from the Heir Male, Gratuito for Kindness and good Offices,) unless the Pursuer will say, that the Sums received were in Satisfaction of the Provisions. made to them as Heirs, by their Mothers Contract of Marriage, which cannot be alledged, seing the saids Provisions are entire Undischarged, & may be Adjudged from the Heirs of Line against the Heirs Male, & which Heir Malei, s likeways lyable to the Creditors, for all their Debt, tho the Heirs of Line have Renounced. D. clxviii. The Lords found the Alledgance Relevant.

CLXXXVII. Viscount of Stormont against Neuall his Chamberland. Chamberland. Chamberland. June 1666.

He Viscount of Stormont, having Right, by his Lady the Relict of the E of An- Evron & const. nadale to her Joynture Lands in that Countrey, & having appointed Adams Neual Chamberland; pursues the said Adam, for Compt of three Years Rent. The Defender alledged Absolvitor, because he was Discharged by the Pursuer of of these Years, conform to an Accompt, Charge and Discharge. Non relevat as to any particular omitted out of the Accompt; specially confidering that the Pursuer was a Stranger in the Place, and ignorant of Rental & therefore may call the Defender to an Account of his own Omissions, which the Pursuer refers to his Oath. Replied, That an Accompt being fitted, and a Discharge granted, it were unjust, after such a Transaction, to quarrel the same

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the Pursuer being major & prudens. Duplied, If this were not Sustained, as to fuch Omissions, it were easie for a Chamberland to Cheat his Master, who may be probably ignorant, of the Condition of the Fortune for the time.

The Lords Repelled the Alledgance, and ordained the Defender to Depone, upon both Omissions of Charge, and Discharge, as they should be

given in by the Purfuer, and found Reafonable.

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CLXXXVIII Dobie against Steinson. June 1666.

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The of a tack.

Ames Dobie in Dalkeith, having a Tack, from fames Steinson the Heir, of an Acre
of Land, for some Years, and ay and while he should be payed of 500 Merks Towing to him by Steinson. Martine Steinson, Brother and Creditor to the said inglifames for a Debt, Comprises the saids Lands, and some other Lands, from his poynding of grow Brother, Charges the Superior to Infeft him, and thereupon, raises Summons a-Equitatint, gainst the said James Dabie, for Mails and Duties, who having proponed upon the Tack; His Alledgance was Repelled, in regard the Years of his Tack was expired, and the Clause Ay and While is Null, wanting an Ish. Thereafter he did Alledge, That for the faid Debt, and some other Debts, owing by the Debitor; he was Infest in an Anuualrent, before the Pursuers Comprising, and Charge." Answered, No respect to be had to the Infestment, being Base, not cled with Possession, nor could it be cled with Possessions because the Comprising & Charge were prior to the Term of Payment of the Annualrent, yea, and to the de m from which the Annualrent began to be due, and so the Pursuer having a Right publick (the Charge against the Superior, being equivalent to a Publcik Infeftment) he ought to be preferred. Replied, That the Defender was in Pofsession of the Land, out of which the Annualrent was ro be uplifted, and so, as Possessor, he was Heretor of the Mails and Duties, and consequently, of the Annualrent payable furth of the Meals, which is equivalent, as if his Infefrment were formally cled with Possession; Nor was it necessary for him, before the Term, to feek a Decreet for Poinding the Ground, seing he behooved to Poind his own Goods, in that case, & intus babuit to pay himself, by the Mails. The Lords preferred the Infestment of Annualrent. for act. 19. P. 1693.

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CLXXXVIII. Craig against the Executors of her Husband. June 1666.

IN a Process pursued, at the instance of Catharine Craig Relict of John Rolling, against the Executors Creditors of her Husband.

The Lords found, that the Executors Creditors were bound to Diligence for the whole Inventar, just as any other Executor, and that not only for payment of their own Debt, but that the Superplus may be furthcoming to the relt of the Defun to Creditors, and others having interest. Soo thad of John March-5. 1079.

FINIS.

Of the Matters in the Decisions of the Lords observ'd by President Gilmour; Containing not only the Determination of the Lords in the Case, but also the Positions in Law made use of in the Pleading which may serve for an Alphabetical Compend, D. stands for Decision, and P. for Page.

ABSENCE,

Hen Absence is received, to repone against a ACCRESCENDIJUS.

A Liferenter being Infeft in Lands, eum Molendinis, at which time there is no Miln built, the Miln afterward built by the Husband accresceth. D. cixxx. p. a Romoving attend to be him? to a Dorlar. D. xxiii.

A CTIO SUBSIDIARIA.
Against a Magistrate, for suffering a Prisoner to escape

D. XV. P. 14. adjourna 1/xix.

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ADMINISTRARE. Administrare tanquam bonns Pater Familias, the meaning thereof. D. xi p. 10.

ADULTERY.

Church fatisfaction, nor accepting fimply a Remiffion for Adultery, makes not Escheat to fell, unless the Partie were pursued Criminally, and defended himself by his Remission. D. xv. p. 13.

Agnal D. 1 xv. 111

ALIMENT.

Albeit the Defuncts Husband's Family be keept till next Term after his decease, the Relict may live where the pleases, and will get a modification for her Entertainment. D. xxv. p. 20. Which is proportioned to the Liferent Provision. Ibid. This modification for the Relicts Aliment, till her Joynture become payable, is not an advance of payment, nor any part of the next Terms Annuity; and it is not allowed in part of payment thereof, when the Relici is Liferenter of an An-

nualrent. Ibid, The difference betwirt a Liferenter of D. clxvii. Lands, and a Liferenter of an Annualrent, for no Aliment is competent to the first, otherwise with respect to the other. D. xxx. p. 24. The Father's Heir and Successor in his Estate, is naturally bound to Aliment a Daughter provided to a Tocher payable at Marriage, ficklike as the Father is bound. D. Ixxv. p. 56. A Relict being by Contrat bound to reftrict her Lifreent, in cafe of Children, the rest being for their Aliment: This Superplus is Alimentary, and will not be affectable by the Father's Creditors. D. clavii. p. 119.

ANNAT.

Annat. D. l. p:36: The profites of the Gleib are not due to the defund Minister's nearest of Kink, unlets fown beforgthe Defundts Death. D. clr. p. 114.

ANNUALRENT.

Infestment of Annualtent, vid, Infestment, Annualrent when it is due to Cautioners, who pay for the principal Debitor. D. cxxiv. p. 91. Arbitral decreit. D. CI.

ARRESTMENT.

An Arrestment of a Rebel's Goods, preferable to a Gift of his Escheat obtained after Arrestment, or even to a Gift prior thereto, if not cled with Possession. D. xxix. p. 23. rid, D. xlviii. p. 35. The Order of At-refling the Mails and Duties of the Herekitas Jacon, for payment of the Debt due by the Defunct or Apparent Heir. D. xciv. p. 72. A loofing of Arrestment does not liberate the Debitor, who has not payed the Sums Arrefted. D. cxxv. p. 91. Arreftment of Sums due per blank Bond, at the instance of a Creditor, to the Person to whom this Bond was granted, is preferable to the filling up a third Parties Name in the blank; tho this filling up be before the Arrestment, but not inti-

Accessory . D.cii.

mated D.claiv. p. 116. Arreftment being laid in the hands of a buyer of Land after Minute, the faid Purchafer is in dole to Affign the Minute, and will be liable to the Atteffet. D. clan p. 122. fel. D. XIV-lix.

ASSIGNEY.

Is prefered to an Arrefter, upon a depending Process. D, i. p. a. The reasons of the preference. Ibid, vid. D. v. p. 4. vid, D. vi. p. 5. A Tutor acquiring Right to his Pupils Debt, cannot make an unquarrelable Assignation, or conveyance; for when the Assigney parfaces for payment, he must find Caution to refound, if after Compring the Tutor be found Debtor to his Pupil. D. xxii. p. 18. An Assignation, by a Woman fo. Juta, to Mails of Lands, in security of a Debt payable after decease, is preferable to the Husbands Right by Marriage, which is cam onere Debiterum, D. xxiv. p. 20. A Defunct's Debitor taking Assignation to a Debt owing by his faid Creditor, must intimate that Assignation to the Executors or nearest of Kin. D. xxxiii. p. 22. Process raised before such Intimation, will prefer the Executors confirmed, fo as the Assigney will get no compenfation. Ibid, It will not extinguish the Debt by compensation, but the Assigney will be in the same condition with the Cedent, as if no Affignation had been made. D. xxxviii. p. 27. The inconvenience in allowing of fuch Affignations. Ibid, Affignation to a Debt made by a Creditor, after Sentence of furthcoming at the instance of the Cedent's Creditor, is obtained againft the Cedent and his Debitor, D. xlviii. p. 35. The import and fignification of the word Affigneys, in Waird Charters. D. Ixxx. p. 61. What Aflignations anent Waird Land, the Vaffal may make. Ihid, the word Affignation respects properly Moveables, and what Beeds not Infeftment. Ibid, p. 62. vid, D. xcix, p. 76. vid, D. cxxiv. p. 91. & D. cxxxii. p. 97. In an exception of Compensation competent against a Cedent, but proponed in a purlute at the Affiguey's instance; it is allowed to be proven by Instrumentary Witnesses, that a ricket without date lubjoyned to an Accompt, is of the date of the Accompt, D, cxlix, p. 205. vid. D. clxx, p: 121. 100. D-XIVI. V.

Bairn D. CXXVI. cliv. Backbons fee Bond.

THE Decreets of Baron Courts not mean'd byin the Als of Parliament, forbidding Compensations to be received after Sentence, D, xli. p, 31. In Baton Courts, Defences in jure are not proper to be proponed. ilid; The unlaw for a renents not compearance at the Mafters Court is Decerned to be 40 fi. D. cv: p: 78.

Base infeftment. See Infeftment.

Cancelled and retired, is no ground of Claim for a rhird Partie, who truly payed the Money, D, vii, P. 6. Bonds personal, obliging to denude of the Right of Lands, if a certain Sum be payed betwirt and a rerm prefixt, are transmissible to the Heir, tho nor mentioned in the Bond, If the Creditor happen to die before that Term. INDEX.

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D. xiii. p. 19. A Clause in a Bond, failzieing Heirsto return to the Debitor, hinders not the Creditor to difrose upon the Sum D.liv. p. 39. Bonds of Provision, D.lx: p: 43 Concerning Bonds & Obligations granted by Married Women. vid Wife. A Bond of Corroboration without the original Bond, is good Title in Actions for payment, unless alledged, that the principal Bond is satisfied. D. xc. p. 69, A Bond being Affigned to a Daughter for her Provision with a Faculty to the Father, an Assignation in trust to do Diligence being made thereafter; a Backbond granted by the Trufty to the Father, his Heirs or Affigneys, will belong to the Daughter the first Affig. ney, and not to the Heir, D. cxxxii. p. 97. A Bond to submit does not expire within Year and Day, as an actual Submission would do. D: cxl. p. 102. A Bond by the Son in Law to his Father in Law, for a small Sum granted, at the time of the Marriage, for diminution of the Tocher, will not be reduced, unless the Son qualifie Circumvention and Enorm Lasion. D. cliii: p. 109. Anent a blank Bond. D. cliv. p. 116.

BOXMASTER

Boxmafter of an Incorporation or Trade, his Office being Annual he can only discharge the Yearly Duties, due the time of his Office. D: cvii. p. 80.

Burgh. D. xcii. p. 70. fat. D. li.

Cancoled bond, is no Jocumon Lac D. vii les D xil

CAUTIONER.

Subsequent Marriage supplyes defects of Solemnities in Contracts, quead the principal, but not quead the Cautioner, D. cxix. p.87. Co Cautioners liable to one another in the Annualrent of what is payed for the principal Debitor, immediatly from the actual payment; albeit they're not bound to pay Annualrent to the Creditor per Bond. D. cxxiv p. 91. The Cautioner being Affigney may feek the whole Sum, from any one of the whole Cautioners, except his own proportion. ibid. The Cautioner of a Tackiman, paying the Mager his Rept, has the Right of Hypothecation in the Rent due by the Sub-Tennent to the Tackiman, and is praferable to all Arrefters. D. CXXX. p. 95. A Cautiomer being bound as Soveny, and full Debtor, but not conjunctly and feverally with the principal, has renanced the benefite of discussion of the principal, D. clails p. 115. Lee D. 1xxv.

CHAMBERLAINS.

Chamberlains after fitting Accompts, in case of Omission either in Charge or Discharge, are Comprable therefore, and bound to Depone thereanent. 9. dxxxvii. p. 136.

CHARTER.

A Charter of Comprising, under the great Seal, when the Debitor's Infeftment is bale, has no effect till confirmation, D. lxii. p. 47.

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A Circumduction of the Term is reducable, when the Partie lefed can qualify a necessary cause of absence, as Sickness, especially when the Decreet sounded on this Circumduction is groundless and exorbitant. D. lxiv. p, 48.

CITATION.

One that is Pursuer with others, in an Action, where he rather should be Defender, needs not be called, his compearance and Citation which is found necessary, is supplyed by his being a Pursuer. D. ix. p. 9. vid. D. xxvii. p. 22. Citing of Tennents is not sufficient, where the Master is most concerned, as in obtaining a Decreet of Locality, D. Ixiii. p. 43. vid. D: lviii. p. 42. the offert of action D. xxix xxxviii. C. L. A. U. S. E. S.

Clauses, see the Titles Bond, Contract, Disposition, Liferenter Tailzie to pay the price of wines according to condition . D. classe. p. 115.

COHABITATION:

Comissar of Edm? D. CXXXVII. p. 100:

COMPENSATION.

Compensation. D. xxviii. p. 22. D. xxxviii. p. 27. A personal Debt cannot take away by Retention or Compensation a real Infestment: D. xxxiii. p. 25. Compensation not receiveable post sententiam. D. xli. p. 31, Compensation sustained by way of Suspension, after Sentence of a Baron Court. ibid. Compensation equivalent to payment. D, lvi. p. 41. No Compensation can be pleaded upon a Decreet lying under question and review. ibid. In case Compensation be craved on such a Decreet, the reasons of review will be summarly discust. ibid. vid. Assigney toward the end. vid. D. xcvii. p. 74. P. XIIX.

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RDS

Council & Session,

From November 1681, to Fanuary 1686. Collected by Sir DAIVID FAL-CONER of Newton, President of the Colledge of Justice.

EDINBURGH,

Printed by James Watson, for John Vallange, and are to be Sold at his Shop on the North-side of the Street, alittle above the Cross. M. D. CCI.

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DECISIONS

OFTHE

Lozdsof Council and Sellion,

From November 1681, to Fanuary 1686.

I. Funeral Charges.

In the Action of Compt and Reckoning, pursued by Heriot Heir to Lieu for and Collonel Heriot, against Dr. Blyth and John Muir Writer to the Signet, as they, who by vertue of a Commission from the Lords, had intrometted with the Heretable Estate, which belonged to the Pursuer as Heir. The Lords sustained the Funeral Charges of the Defunct's Relict, who survived him, as an Article of the Defenders Discharge; And found, That the Relict having no Means, or Estate, to defray her Funeral Charges, the Heir of her deceast Husband was liable therefore, she having died Widdow.

Il. 23 November, 1681. Order of Redemption

In the Action of Reduction and Declarator, pursued at the Instance of Sir Michael Nasmith of Posso, against his Son James Nasmith. The Lords found an Order of Redemption of an Apprising, against the said Sir Michael, whereto his Son James had Right, null, in regard the Procurator had no Warrand from Sir Michael, the time of using the Order; and that the Procurator, who compeared for the Compriser, the Time of the said Order, took Instruments that there was no Procuratory produced: But this Speciality was the Reason of the Decision.

III. Eodem die.
Requisite of an Execution of a Comprising.

IN the Action of Reduction, pursued at the Instance of James Sanders, Donator in a Gist of the Ultimus Hæres of James Monteith, against George Jerden

den, wherein he craves an Apprising deduced in Anno 1653, against the said James Monteith, at the Instance of Fullerton, from whom Jarden derived Right, might be reduced upon this Reason, That the Comprising, and Execution of the Letters bear not, that there was a Schedul delivered to the Party, but only bore that he was personally apprehended, and lawfully warned, which Reason of Reduction, The Lords found Relevant to take away the Comprising simply, albeit it was expired, in regard they found, that unless a Schedul had been delivered to the Partie, he could not come prepared to the leading of the Comprising, or know what Sums he was to pay to the Creditor, who intended to deduce the Comprising, for himself, or as Assigney by others.

IV. 29 November, 1681. Deeds elicited, vi aut metu

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IN the Suspension Heriot against Bird; Heriot being charged upon a Bond and Disposition, granted when he was under Caption, raised upon his Tack for Payment of his bygone Rent, and at the Instance of the said Bird his Master, he did grant a Disposition of his Corns and other Moveables for the Masters Payment of the bygone Rent, and for his Security in time coming during the years of the Tack, and also obliged himself to find a new Cautioner, in regard, the Cautioner in the Tack became infolvent, His Reason of Suspension being, that he offered to prove that the bygone Rent was payed, which was the Ground of the Caption, and as to the Disposition of his Moveables, and the Obligement to find a New Cautioner, the same was null as being extorted when he was under Caption. The Lords found, That altho whatever was done in relation to the Ground of the Caption, could not be faid to be done ex vi aut metu: yet these Extrinsick Deeds elicit from the Poor Tenent, viz. The Disposition of his hail Moveables for Security of the Rent for the years to come, and the Obligement to find a New Cautioner was null, as being vi & metu extorted while he was under Caption.

V. November, 1681.
An Adjudger removing Tenents.

IN an Action of Removing, Halliday contra Bruce of Kennet, there being Compearance for several other Adjudgers, who were within year and Day of Halliday, it was alledged, that his Interest being but 1000

lib. he could not remove the Tenents and Possessor the Prejudice of other Adjudgers. The Lords found, That Hallyday could not remove the Tenents, except he found Caution for the Mails and Duties to the rest of the Comprisers, so far as concerned their Interest.

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VI. 9 December, 1681.

Adjudication.

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IN an Action of Reduction, pursued at the Instance of Geddie, against Telfer, of several Adjudications deduced against Geddie, whereunto Telfer had Right. The Lords found, the following Reason of Reduction, relevant to retrench the Principal Sum, and Annualrents, and Composition payed to the Superior without accumulation of Annualrent upon Annualrent, viz. that the Adjudication being in absence, without Probation of the Rental of the Lands adjudged, the Decreet bore a Fifth Part more, which the Lords found, because albeit the Creditor behoved to libel the same in his Summons, being uncertain whether the Debitor would compear or not, yet that he ought not to have extracted a Decreet therefore, when the Partie did not compear.

VII. Eodem die. Reduction ex Capite Minoritatis & Læsionis.

against the Earl of Queensberry, of a Decreet recovered against the said John Maxwel, as representing Robert Maxwel his Father, who was Intromettor with certain Terce Lands belonging to his Mothers Husband Cruik of Stewartoun, and upon which Decreet there was a Comprising deduced, to which the Earl had Right; the Reason of Reduction was Minority and Lesion, in so far as, the Decreet bore, that Robert was Intromettor, whereas Robert was an Insant at the time, and also, that there were Three years Duty decerned after John was charged to enter Heir to Robert. The Lords repelled the first Reason, and found that the Decreet bearing that Robert's Intromission was proven, they would not reconsider the Depositions after so long a time, to the Prejudice of the Earl of Queensberry, who was Assigney to the Comprising, and so a singular Successor, but they restricted the Comprising as to the years that the Decreet bears Robert's Intromission.

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VIII. 15 December, 1681.

A Bond taken away by the Deposition of Witnesses examined ex Officio.

Not the Action pursued by Mercer of Clavage, against the Lady Aldie. It being alledged for the Lady, that the Bond was an old Bond, being granted in Anno 1643 to the deceast William Mercer, Clavage's Grandfather, never heard of now, by the space of 38 Years, and the Creditor being in a poor and mean Condition, and the Debitor being Solvent; it was prefumed to have been payed, and that in Aldies Charter Chest, there was a Missive Letter, importing a Discharge, which was lost, when the Charter Chift was brought over to Edinburgh, in a Debate betwixt the Heir Male, and the faid Lady, as Heir of Line, and that she offered to prove that there was Money payed by Sir James Mercer, equivalent to the Sum contained in the Bond, and that the Creditor William Mercer, dec'ared that Sir James was not resting him any thing. The Lords having examined Witnesses ex officio upon the foresaid Points, they found the Bond payed, and assoilzied the Lady, In respect of the Taciturnity of the Debitor and other Circumstances abovewritten proven by the Depositions of the Witnesses. Heret ago Safanding .

IX. Eodem die. Succession.

mid But fond your on N the mutual Reduction pursued by Johnston against Watson, and War fon against Johnston, of two Services, the one, being of the eldest Brothers Son, as Heir to the youngest Brothers Son, and the other Service, being of the MidBrothers Oye, as Heir to the youngest Brothers Son. The Sobied of Rein Lords found, that the Subject Matter in debate, being Heretage in the Person of the Defunct, who was the youngest Brothers Son, his Right being a Disposition from his Father, and so was praceptio hereditatis, that the mid Brothers Oye had Right, and not the Descendants of the eldest Brother, In regard they found that the Heretage of a youngest Brothers Son did Ascend and belong to the midle or immediatelder Brother, and did not ascend per saltum to the eldest Brother.

X. Eodem die. Servitude Urban.

Damning & Sup

Jennont

Skaith Par

R. James Deans, having recovered Decreet before the Dean of Guild of Edinburgh, against Alexander Abercrombie for Payment of his House.

House-mail; there was Suspension raised at Abercrombies Instance, upon this Reason, That the Dean of Guild had committed Iniquity; in so far as he had repelled the Desence following, viz. That Sir James Cockburn being Heretor of the Tenement, above the Suspenders Lodging; by Warrand of the Dean of Guild, took off the Roof off the House, and heighted the same, wherethrough the Suspenders Lodging, was exposed to the Stones, and Rubbish that sell down upon him the time of the building; and being a Vintner, no Person would sit in his Rooms; whereby he was damnified, through want of his Change, and his Wine spoiled. The Lords sinding, that the Damnage proceeding from the Nature and Quality of the inserior Tenement, and that the Heretor of the Superior Tenement, was not bound to keep the Tenent of the Inserior Tenement Skaithless, therefore they sustained the Reason of Suspension.

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XI. 16 November 1681. Interuption of Prescription. Son inha and while.

In the Action pursued by Mackdougal against Arbuthnet of Fiddess's for Payment of a Debt, due by Archibald Arbuthnet, Fiddess's Brother, to the said Mackdougal; which the said Arbuthnet of Fiddess, was by his Missive Letter, obliged to Pay. It being alledged for the Desender, That the said Missive Letter was written in his Minority, and to his Lesion, whereupon he had raised a Reduction intra annos utiles. It was replyed for the Pursuer, that no respect could be had to the Reduction, seeing it was raised in Anno 1677, and only one Execution for the first Diet, so that the Instance was perished and could not be insisted in. The Lords found, that the raising and executing the Summons, once, intra Annos utiles, was sufficient to interrupt the Prescription, so that he might yet insist, albeit the Auni utiles were run, Schave the benesit of Restitution by way of Reduction.

XII. 21 December 1681. Summar Complaint.

There being a Bill of Complaint given in by the Laird of Lamertoun, a gainst the Earl of Home, making mention, That he was in Possessis on of several Lands of the Barrony of Home by vertue of Insestments, That the Earl of Home had holden Courts, and decerned the Tenents to make payment to him of the Mails and Duties, notwithstanding that there were several Suspensions raised at his, and the Tenents Instance, of the former Decreets obtained by the Earl, in his said Barron Court, for other Terms

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Logo Sig ponsion preceeding, which Suspension the Earl hath never discust. And it being alledged for the Earl, That albeit he was cited upon the said Complaint by a Macer, yet he was not obliged to Answer without a Signet Letter, he not being a Member of the Colledge of Justice. And it being Replyed, That this being a Contempt done to the Lords Authority, the former Suspensions, being not only for the Terms specially mentioned therein, but in time coming, he ought summarly to Answer to the said Complaint. The Lords ordained Letters of Horning, to pass against the Earl, ordaining him to find Caution to desist from troubling the Tenents, until the Discussing of the Suspensions.

XIII. 22 December 1681. Removing.

Okwasning Remobings.

Tenent to Bethun of Blebo, against his said Master, of a Decreet of Removing, recovered against him before the Sheriss of Fife, for not payment of by-gone Rents, and finding Caution in time coming. The Lords found the Decreet null, as being recovered before the Sheriss, whom they found not Judge competent in extraordinar Removings of that Nature, even albeit the Desender did compear, and so, as was alledged, prorogated the Jurissicion: And also in the same Process, The Lords found, That there was no necessity of Warning in extraordinar Removings of this Nature.

aver Swell. 24 December 1681. The Import of the Clause, Cum Brueriis.

of the Barrony of Dean, against one of his Feuers, Wherein he craved, That the said might not have Liberty to Brew, not being insest cum Brueris, without Licence of Sir Patrick Nisbet, who was Superior and Barron of the Barrony, whereof the said Feu was a part. The Lords found, That the Feuer, being insest in his Feu by his Superior, might Brew, or use any other Manusactory, without the Superior his Licence; and that these Words, Cum Brueriis, were only Exegetick; and that the Nature of the Feu did imply the same, though not express: And therefore associated the Desender.

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Ing religend xon in a flende. What Right Seamen have to the Ship for payment of their Wages phio a ship.

VErtain Seamen, having, for their Wages, purfued Robert Miln, who hapshagus bought the Ship from Ludquhairn at a Roup, upon this ground. That they being violently put out of the Ship, without payment of their Wages: And having complained to the Council, Robert Miln, in Obedience to the Councils Order, gave Bond, wherein he obliged himself to make payment to the Seamen, of what the Ship should be found lyable for. It having been alledged for Robert Miln, That he had bought the Ship upon a Roup, and the Seamen having no Hypotheque nor Real Right to the Ship for their Wages, he was not lyable upon his Bond, to make payment. The Lords found, That the Seamen had jus retinendi & infifendi for their Wages: And having been violently put out of the Ship, they were in the case, as if they were in Possession: Wherefore the Lords decerned Robert Miln, upon his Bond foresaid, to make payment to the Seamen of their Wages.

> XVI. Eodem Die.

The Import of a nakedClause of Infestment, without an Obligement to pay.

IN an Action pursued by Rachel Wilkie, against Mr. Henry Morison, as of farker Representing her Husband Henry Morison, for fulfilling of her Contract of Marriage, viz. For imploying of 20000 Merks for her Literent Use; and also, in regard there was an Obligement in the said Contract, for infefting of her in an Annualrent of 400 Merks, to be uplifted out of feveral Tenements belonging to her Husband in Edinburgh, which Tenements became ruinous, and were taken down by the Defender, by Order from the Dean of Gild, she did conclude, That Mr. Henry, as Heir to her Husband, ought to be lyable to her for the faid yearly Annualrent. And it being alledged for the Defender, That he, as Heir to her Husband, could not be lyable personally for payment of the Annualrent, in regard there was no Personal Obligement for payment in the Contract, but allennarly Personal Obligement for insefting, and which was fulfilled, she being infest accordingly. The Lords found, That this being a Contract of Marriage, which was Contractus maximæ bonæ fidei, the Husband was lyable to make the Tenement Habitable: And therefore, the Tenement having become:

come ruinous by time, they found the Defender, as Heir to the Husband, was lyable for the by-gone Annualrent, and in time coming, till the Tenement was re-built, and made so that she might have Tenents thereto.

XVI. 11 January 1682. Tocher and the Jus Mariti.

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IN an Action for making Arrested Goods forth-coming, pursued by Campbel Spouse Creditor to Patrick Tailfer against to the said Patrick, wherein the Arrester craved, That Patrick Tailfers Wife. might make forth-coming the Sum of 10000 Pounds, which she was obliged authon in her Contract of Marriage with Patrick, to pay to him: As also, That her Moveables, & Printing Press might be made forth-coming for payment of the faid Patrick his Debt, wherein they were Creditors to him. It was alledged for the Defender the Wife, That the could not be decerned to make forthcoming the 10000 Pounds foresaid, because her Husband was obliged to eik, 20000 Pounds of his own Means, for her Liferent Use, and the Bairns of the Marriage: And it being a Synalagma, the Creditors could be in no better Case than the Husband; But so it was, that the Husband behoved to imploy both Sums for her Liferent. The Lords Sustained the Action for making forth-coming, the Creditors finding Caution for her Liferent of both Sums. It was further alledged for the Wife, That, her Moveables. and Printing Press, could not be affected by the Husbands Debt, because, by Contract of Marriage foresaid, and in Contemplation of the Tocher above-written, and that there was an Overplus of Means belonging to her, and that her Children of the first Marriage were unprovided, he renunced his Jus Mariti, and did consent, that she should dispose thereof, in favours of her Children, or any other way she should think fit. The Lords found, That albeit the Husband had renunced his Jus Mariti, yet, she not having actually disposed on the same, before the Marriage, nor exerced the Faculty, after the Marriage, it did recur and fall back under the Jus Mariti, especially, seing that by the Contract, the Wise had not only a Power to Distribute among her Children, but to her Husband, or any other she thought fit: But if the Reservation had been simply in favours of the Children, and that the Faculty, had not been further extended, the Lords inclined to have fustained the Defence.

The Decisions of the Lords of Session, 1882.

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XVII. Eodem die. Simulat Rights.

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werken diliganed. IN an Action of Reduction pursued at the Instance of Robert Hamilton paripagen. Merchant his Creditors, for reducing a Disposition, granted by him in special beto Favours of his Sister and Brother in Law, of his House and Shop, upon this the area when Reason, that the same was simulat, seeing it was made retenta Possessione, he having continued in the Possession of the House and Shop, by the Space ad 18 9-621. of two Years; and having fold and disposed of the Goods as formerly. The at the Hain. Lords found, in respect that the Seasin upon the Tenement was not taken I instance of Pl for a Year and a half after the Date of the Disposition, and that the com-2. mon Debitor continued in Possession of the House, Shop and Goods as formerly, and kept an open Shop; and the same being all the Estate he 3. had, till he broke, they reduced the Disposition as being simulat, ad hunc effectum, to bring in all the Creditors pari passu, according to their Diligence. But the Lords did not incline to furtain the Reason of Reduction 2. xcviii. following, viz. That by the Act of Parliament 1621, he was Bankrupt, and at the Horn, and so could not Dispone to this Defender, albeit a Creditor, to prefer him to other Creditors, the Disposition being omnium bonorum, feeing that the Horning was not used at the Instance of the Pursuer, and the common 2 Debitor, used Trading and Merchandizing, keeped a publick Shop, long after granting the Disposition, and that the Defender3did offer to condescend upon, and to prove the Onerous Cause,3. by producing and instructing by Bond, that he was Creditor ab ante to the common Debitor. This after & amend to by the modeun Prachish. 1721.

XVIII 20 January. Servitude of Pasturage.

In the Declarator pursued by Major Cockburn, contra Brown of Dolphing ton, for declaring his Lands of Milrig, to be free of a Servitude of 16 Soums Grass, which was alledged to have been constitute upon the Lands of whereof Milrig is a Pendicle. The Lords, after a Visitation and Examination of Witnesses, found, the Servitude sufficiently constitute by the Writes produced, and the Depositions of the Witnesses, who proved 40 Years Possession of the Pasturage of the said Soums Grass, not only upon the rest of the Lands, but also upon Milrig, and that by receiving of 8 Merks, Yearly, as Milrig's Proportion of the said 16 Soums Grass, but in regard, that the Prescription of Fourtie Years was made up partly by the Natural Possession of Passuring, and partly by receiving the

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faid 8 Merks: The Lords restricted the Servitude only to 8 Merks, and declared the Servient Tenement liable thereto in time coming, and not to be liable to the Pasturing of the 16 Soums.

> XIX. 21 January. The Effect of a Citation upon a Summons of Adjudication.

proferones volutal rights. IN the Competition betwixt the Creditors of Menzies of Enoch, there Dowglass, who had Right was Compearance made for to an Annualrent out of the Lands of Enoch from Sir George Lockbeart, who was infest in the said Annualrent from the common Debitor, and who craved Preference to who had adjudged the the faid Lands, upon the New Act of Parliament anent Adjudications. It was alledged for the Adjudger, that he ought to be preferred, because by the foresaid Act of Parliament, Adjudications come in place of Comprisings, and a Citation upon an Adjudication is equivalent to a Comprising, and a Charge against a Superior, and that he used his Citation upon the Adjudication before the granting of the Infeftment of Annualrent, in so far as the Citation was in April, and the Right of Anualrent was only granted in May thereafter, and that he was in a Course of Diligence. The Lords in respect of the Citation, preferred the Adjudger.

acquire be coheir Comprising acquired to the Behoof of the Debitor's Apparent Heir. XX. 2 February, 1682.

IN an Action of Declarator, pursued by Adam Gordon, as Creditor to the deceast Viscount of Frendraught, this Viscount's Grandsather, against this Viscount, the Lady his Mother, and Bogney her present Husband, (which Bogney stood insest, upon an expired Comprising deduced at Gregories Instance, upon the Estate of Frendraught, and who had given a Backbond, declaring that his Name was in the Comprising for Security of what Sums he had, or should advance, and for the Ladies Security of her Jointure, and for the Fie of the Estate to belong to this Viscount, in Implement of the Contract of Marriage, betwixt the deceast Viscount, and the Lady) craving that the Comprising in Bognies Person, might be declared liable, to this Viscount's Grand-Father's Debt, in regard, the Comprising was acquired by the deceast Viscount his Means, and was blank in his Possession, and so was redeemable upon Payment of the Sums of Money truely

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truely payed, conform to the Act of Parliament 1661. It was alledged for the Lady and the Viscount, that the Comprising was not acquired by his Fathers Means, but by a Sum, which was secured, by an heretable Security standing in his Mothers Person, and that his Father, was only a Liferenter, and that he would succeed, as Heir to his Mother thereto. The Lords found, that this Right in Bognies Person, albeit acquired by his Mothers Means, fell under the Act of Parliament, and therefore declared the Remainder of the Estate liable over and above Bognie's Satisfaction. the Ladies Jointure, and 20 Chalder of Victual, which the Lords did allow to the Viscount for the foresaid heretable Securities, which stood in the Mothers Person, and was uplifted and applied for acquisition of the faid Comprising.

XXI. 7 January, 1682. Aliment to an Apparent Heir.

IN the Action for Aliment, pursued at the Instance of Robert Hamilton, Fiar of the Lands of Airdrie, against Margaret Hamilton, one of the Liferenters thereof, wherein he libelled, that the Estate whereof he was Fiar was exhausted by Liferents and Debts, so that he had not a maintainance. It was alledged for the Liferenter, that there could be no Aliment. in respect that, her Liferent was constitute in her Contract of Marriage by her Husband and Father in Law, and that at the time of her Husband and Father in Law's Death, there was sufficient Estate to have Alimented the Pursuer's Father, who was then Heir, being then Brother to her Husband: And that if he has contracted Debt, or provided a New Jointure to his Wife, whereby his Son the Pursuer is prejudged of an Aliment by exhausting the Estate, she could not be prejudged by the subsequent Deed of the Appearand Heir. And it being replyed, that the Pursuer needed to fay no more, but that he was an Heir to an Estate, which was exhausted by Liferents and Debts. The Lords found, that the Estate was to be confidered as it was the time of the Desender's Husband's Death; so that if it was not exhausted by Liferents or Debts at that time, there would be no Aliment sustained at this Pursuers Instance, who was not immediat Heir but by progress collateral Cafualish of of Jupish

XXII. Eodem Die. Precept of Clare constat.

IN the Action pursued at the Instance of the Earl of Cassil's, against, the Lord Bargenie, wherein he craved the waird Duties of certain Lands B 2

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holden of him waird, the nonentry of certain Blenth Lands, and the Feuduties of Feu-Lands, holden likewife of him. It having been alledged by the Lord Bargenie, that he ought to be assoilzied from the haill, because the Earl had entered him to the haill Lands by a Precept of Clare constat. which did import a Formal Discharge of all, either Waird, Blench or Feu-duties, or Nonentries. And it being replyed, Whatever might be faid to blenth, and Feuduties, that they were prefumed to have been past from, or discharged, as being debitum fundi; yet as to Waird Duties, which were not debitum fundi, and whereto my Lord Bargenie was not liable as Heretor, but as Intromettor, the Precept of Clare constat could not be extended thereto. The Lords found, That in regard Superiors use to clear all the Casualities before the Entry of the Vassal, that the Precept of Clare onstat included all, both Waird-duties, Blensh, Feu and Nonentries, and eid import a Discharge thereof.

Palsibelitte in quanty. 3 November.

comprising you The Case of an Appearand Heir's being lyable to his Fathers Debt.

TR. Hendry Blyth being a Creditor, of Umquhile James Lawson of Brotherstones, intents Process against James Lawson, as lawfully charged to enter Heir to Umquhile James Lawfon his Father the Debitor, and as he who being lyable to his Brother and Sifter for 1000 Pounds: And also, as having granted Bond to one Dunlap for a certain Sum of Money, upon both which Grounds, There was a Comprising of his Fathers Lands of Brotherstones led against him, the Ground of this Action was, That he had suffered his Father's Estate to be Comprised for his own Debt. and so Blyth, a Creditor of the Father's, was secluded. It was alledged for the Defender, That the Earl of Nithisdale's Practique was only Jan. 1662 in the Case, where Bonds were granted by the Appearand Heir, whereupon Comprising of the Defunct's Estate was deduced, for the Heir's behove: but in this Case, the Comprising was not to the Defenders behove, neither has the Pursuer, done Diligence to affect the Estate debito tempore. The Lords found, That albeit there was no Fraud nor Dole, and that the Comprising was not to his own behove, yet, that the Defender ought to be lyable to the Pursuers Debt, so far, as the Sum, contained in the Apprising, might extend to, or otherways, he ought to purge the faid Appriling, to the effect that the Pursuer, who was the Fathers Creditor, might have Accels

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cess to the Lands Comprised, which was the Fathers Estate, without being incumbered with the foresaid Comprising, which proceeded upon the Son's Debt.

XXIV. 4 November 1682. Possession of Goods Spuilzied good grace of many

IN an Action of Spuilzie, pursued by Duncan Campbel, against Christie, wherein the Libel being admitted to Probation, and it being only proven by the Depositions of the Witnesses against the Desender, That one of the Beasts Spuilzied was in his Possession. The Lords, in respect it was a Depredation, found, the having of one of the Goods taken away, by way of Depredation, made the Desender Iyable for the whole Goods, which were proven to have been Spuilzied, and the Profits thereof, albeit it was not proven, that the Desender had any Accession to the Depredation otherways, than that he had one of the Beasts Spuilzied in his Possession, as said is.

XXV. 7 November 1682. The Back-Tack of Wadjet Lands. Sup Con or heart

Argaret Phine having a Wadlet Right, from David Phine of Whitelaw, affected with a Back-Tack; and the Back-Tack Duty, being resting for several Years, the said Margaret, intented a Declarator of the Nullity of the Back-Tack, for not payment of the Back-Tack Duty: Wherein there was a Conclusion likeways, That Jean Duncan the Relict of the Granter of the Wadset, and David Phine his Son, may be decerned personally, for payment. And this Desence being proponed, That there was no irritancy in the Back-Tack: And therefore the same could not be declared null, for not payment of the Back-Tack Duty. And it being Replyed, That, the Back-Tack, was of the Nature of a Tack: And that it was ordinary to Masters, to pursue Removings against their Tenents, albeit there was no Irritancy in the Tacks: In which Cafe, the Tenents will be lyable in payment of by-gones, and in finding Caution for time coming. The Lords found, That by the Common Law, this Declarator might be futtained: And therefore decerned, but superceded Extract till Candlesmass next, at which time, the Detenders might purge by payment of by-gones, and finding Caution in time coming. XXVI.

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11 November 1682. Qualified Oath, and Chamber Mail.

IN a Suspension at the Instance of the Master of Ross, against Windraham, antermod wherein, Windraham did refer to the Masters Oath, That he accepted being inflated a Precept drawn by (from whom he had taken a Cham-Lolothon ber,) in favours of the faid Windraham, for payment of a Sum of Money to him: And the Master having Deponed, That he did Subscribe the Acceptation of the Precept, and delivered it, to his own Servant, in these Terms. That his Servant should not deliver it up, until the Term of Payment of his Chamber Mail: As also, That he should not deliver it up, till he gave further Order. The Lords found, That the Precept being Windraham's Evident, the Subscribing the Acceptation thereof was Obligatory, albeit the Acceptation thereof was not delivered as faid is: And therefore, found the Letters orderly proceeded. But in regard, that the Fond, out of which the faid Precept was to have been Answered, was the Masters Chamber Mail, whereof the Term of Payment, was not come the time of the Acceptation: And that, before the Term of Payment, the Drawer of the Precept, or his Servant, had broke up the Door of the Chamber, and had taken out several Linnings of the Masters, to the Value of the Chamber Mail; Therefore, if the Master could instantly verifie, that the saids Goods were taken out before the Term of Payment of the Mail, The Lords would allow the Master Retention pro tanto.

Eodem Die. Spuilzie in Excluding from Possession.

mailly for N an Action of Spuilzie, pursued at the Instance of Lisk against Scot, upon this Ground, That Scot having fet to Lisk a House in Aberdeen: point of fundamental Lisk having entered to Possession of the said House, the Landlord, Juram is Clem within three Moneths after Whitfunday, before there was a Terms Maill Met due, excluded Lisk from Possession of the House, by putting a Padlock thereon, and so secluded him from the Use of his Moveables, and refufed to allow him Entrance to the House. The Lords sustained the Spuilzie, and allowed Lisk Juramentum in Litem.

15 November 1682. A Seafin propriis manibus. informat of forfino XXVIII.

name of Action of Reduction, pursued by King, against Chalmers, The Defender did alledge, That the Pursuers Title, being a Gist of Ultimus m.

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Thomas Chalmers, who were infest, only by a Seasin propriis manibus, given by the Grand-Father to them, of a certain Tenement: And which Seasin, not being subscribed by the Grand-Father, neither having any Warrand, nor being adminiculat by any subscribed Writ, was not a sufficient Title to quarrel the Desenders Right, which did flow, from the Heir of the Grand-Father of the said Thomas and James Chalmers; by vertue of which, the Desenders, and their Authors, had been 40 Years in Possession. The Lords found, That James and Thomas Chalmers Seasin, not being subscribed by the Granter, nor adminiculat by any subscribed Writ under his Hand, to be only the Assertion of a Nottar, and so not a sufficient Title to quarrel the Desenders Right: And therefore, associated the Desenders.

XXIX. Eodem Die. Dovecoat.

In a Suspension at

Duries Instance, against the Laird of Orrock, of a Decreet recovered at Orrock's Instance, against the said

Durie, before the Baillies of the Regality of Dumserling,
wherein he is decerned to demolish his Dovecoat upon the Act of Parliament, as not having ten Chalders Victual of yearly Rent contiguous to
the said Dovecoat. The Lords would not decern him to cast down the
Dovecoat, in regard there was a Byre under the same, but ordained him
to translate the same from being a Dovecoat to any other Use.

XXX. 21 November 1682.

Competition betwixt the Fathers Creditors and his Heirs of Provision, upon the Contract of Marriage.

R. Andrew Marjoribanks, in his Contract of Marriage with Kinlock his Wife, is obliged to imploy 10000 Merks of Tocher, (which his Mother in Law, by that Contract, was obliged to pay to him) with other 10000 Merks of his own Money, to himself and his Wife in Liferent, and to the Children to be procreat of the Marriage, in Fie. And it is declared by the said Contract, That it should be lawful for the Children; as Creditors, to pursue the Fathers Representatives, or to enter Heir, as they thought sit, Francis Kinloch and Sir James Rochead are appointed by the said Contract to be Trustees, at whose Instance Execution is to pass: There being only one Daughter of the Marriage, the said Trustees.

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have adjudged the Fathers Estate, for the foresaid 10,000 Merks; Sir John Nisbet, and other Creditors of the Father, have adjudged the same Lands. and have intented Reduction of the Adjudication deduced at the Truftee's Instance, upon this Reason, That the Provision of the foresaid Contract of Marriage, is but a naked Destination, and that the Father was Fiar: And albeit the Adjudication was led after a Child was born, yet they were in bona fide to Contract with the Father, and to lend him Money, there being no Diligence done upon the Contract of Marriage, until after they became Creditors to the Father: And albeit the Child, might be Creditrix to the Father, being in Competition with his Heirs, yet the could not compete with the Pursuers, who were lawful Creditors: And that this Case, was decided betwixt Sarah Rome, and Ronald Graham, where the Lords preferred Ronald, as being a Creditor of Sarah Romes Father, albeit after Sarach's Mothers Contract of Marriage with her Father. and after Inhibition had been ferved thereon. And it being answered for the Defender, that the Father was only Liferenter, and the Child was Creditrix by Contract of Marriage; and so having done Diligence by Adjudication, ought to come in paripassu with the Pursuers, being within Year and Day to them. 2 do. The 10000 Merks, which was the Mothers Tochar, was uncontravertible, seeing it was never the Fathers, but was payed to him, to the effect it might be imployed as faid is. It was replyed for the Pursuers, That this being a general Obligement, and having no special Assignation to a particular Sum, and there being no actual Imployment of the Money in the Terms of the Contract, neither any Diligence done before the contracting of the Pursuers Debts, the Pursuers are prescrable, the Subject Matter now adjudged, being a Land Estate, which was the proper Estate of the Father. As to the Tochar, it was in the same Case with the 10,000 Merks foresaid, it being payable to the Father, and actually payed to him, and the Father was only obliged to imploy it as he was the other 10,000 Merks in the Terms foresaid. The Lords found, That the Obligement in the faid Contract was but a Destination, there being no actual Imployment of the Money, or Diligence done before contracting of the Pursuers Debts, they preferred the Creditors to the Child and her Trusties, and reduced the Adjudication following upon the Contract of Marriage.

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Labouring Goods in Labouring time. The Lords found these two Deten-

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fess separatim relevant, viz. That the Goods libelled were in the Possession of from whom they were Poinded, who did not concur in the Pursuit. 2do, That the Desender offered to prove, that there was Sufficiency of Labouring Goods lest, for Labouring the Pursuer's Mailling, and that the Ploughs were lest going: But the Lords, for clearing the Matter of Fact, appointed a Conjunct Probation before Answer.

XXXII. 22 November 1682. Inhibition and Presciption thereof.

IN an Action of Reduction, Ex Capite Inhibitionis, pursued by Moultray against Porteous, of a Bond granted by the common Debitor, whereupon Comprising had followed. And it being alledged for the Defender, that the Inhibition was prescribed, being served in anno 1633. And it being Replied, that the Prescription was interrupted by a Comprifing deduced upon the Bond, which was the Ground of the Inhibition, and which Diligence being upon the Bond, did interrupt Prefcription thereof, and confequently of the Inhibition which was accessor thereto. The Lords found, That the Comprising upon the Bond was not an Habile Diligence, which could be ascribed to the Inhibition: But they found, That the Prescription did not run from the Date of the Inhibition, but from the Date of the Comprising, which was led upon the Defenders Bond, seing the Inhibiter could not know of the Bond, until the Diligence was done thereupon, to affect the Heretable Estate; therefore found, that the Prescription of the Inhibition did only begin from the Date of the Defender's Comprising. 1 Graning a grade poton

XXXIII. 28 November 1682. Behaving as Heir.

In the Suspension, pursu'd by the Earl of Middleton contra Sir James School Stanfield, of a Decreet recovered at Sir James's Instance against the Earl, as lawfully charged to enter Heir to his Father. The Earl having alledged, that the time of the pronuncing of the Decreet he was absent Reipublicæ causa, being Ambassador for the King, to the Emperor, and that he produced now a Renunciation. It was Replyed for Sir James, That he could not renunce, because he had behaved as Heir, by granting a Factory to William Cooper, for uplifting the Rents of his Fathers Estate the Year 1674, and by-gones preceeding his Fathers Death; and that

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accordingly, his Factor had uplifted, and compted with him, and remitted feveral Sums of Money to him by Bills. It was Duplyed for the Earl. That the Factory produced, being dated in December 1674, his Father having deceased before Whitsunday that year, it was only in general Terms to uplift the Rents of the Defenders Estate in Scotland, and that the Defender had an Estate, properly belonging to himself, before his Fathers Decease, viz. The Lands of Graslie, to which the Factory might be applicable: Likeas, the Defender could not behave as Heir, by granting a Factory for uplifting the Rents of his Fathers Estate, whereto it was impossible he could have Right, as Heir of Line, seing his Father, in his own time, did refign his whole Estate in Scotland, in favours of his second Lady in Liferent, and the Children of the Marriage in Fie, whereupon there was a publick Infeftment, wherethrough the Lady had Right to the Maills and Duties, after her Husbands Death: Likeas, he had a Tack from the Lady, which did commence from the deceast Earl's Death. And albeit the same was after the Factory, yet seing the Factory before that Tack could not be effectual, the granting thereof could not infer a Behaviour as Heir. The Lords found that Allegiance relevant for the Earl, that his Fathers whole Estate was provided in favours of the Lady, and the Heirs of that second Marriage, relevant against the Passive Titles of Behaviour as Heir, and allowed him to renunce. Greagon formediat

XXXIV. 6 December 1682. Forfeiture.

THe Lady Caldwall, having pursued a Poinding of the Ground, of certain Lands wherein she was insest upon her Contract of Marriage. to be holden base of her Husband, who was Forseit for Rebellion anno Law found 1666, and which Land her Husband held immediatly of the Earl of Egling-Commicipations. There was Compearance made for General Dalziel, who alledged, that there could be no Poinding of the Ground, because her Husband, who was her immediat Superior, was Forfeited; and that he was Donator, and was apon a Presentation insest by the Earl of Eglingtoun Superior. It was Replyed for the Lady, that albeit, where the King's immediat Vassal did Forseit, all the Sub-Vassals Rights did fall in Consequence; and that the Feus appertained to the King and his Donator, free of any Right granted by the Traitor, unconfirmed by His Majesty, and that Jure Feudali, as immediat Superior, yet in this Case, where the Forseit Perfon was not the Kings immediat Vassal, but the Earl of Eglingtoun's, there

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was no more Forfeit, but that which was standing in the Rebel's Person, which was only the Superiority, the King only having Right in this Case, Jure Coronæ, as he has to all Allodials, as did appear from the 5th. Act of the 9th. Par. K. fa. 6th. which bears, That upon the Kings immediat Vassals Forfeiture, his Lands were to remain with the King as Property: But as the other Lands, not holding immediatly of the King, the King had only Right to present a Vassal to the Lands pertaining to the Rebel: and in that same Act, there is an express Provision, That neither the Donator of the Forfeiture, nor the Forfeit Person's Vassals, should be obliged to procure a Discharge of the Feu Duty, due to the Forseit Person's Superior, nor should be in hazard of irritating their Feus upon that account, which Proviso had been superfluous, if the Forseit Person's Feus had fallen under the Forfeiture. It was Answered for Dalziel, That altho, by the Feudal Law, upon Delinquency of the Vassal, the Feu did return to the immediat Superior, yet by the Municipal Law of this Kingdom, it did fall to the King, and did open that same way and manner to him, as it did to the immediat Superior, by a Feudal Delict, such as Recognition, Purpresture, &c. And that it was clear, there is Nexus Feudalis betwixt the King and all the Sub-Vassals, that he had Right to their Lands, not only Jure Coronæ, but Jure Feudali; and that the same had been already decided, in anno 1610, as was observed by Haddingtoun: Where it was found by the Forfeiture of the Earl of Bothwel, his Vassals Right fell to the Donator, albeit the Forfeit Person, did not hold the Forfeit Lands immediatly of the King, but of Dumbar of Cumnock. The Lords found, in regard, that the Ladie's Right was not Confirmed by the Earl of Eglingtoun her Husbands Superior, her Right fell under the Forfeiture; and therefore, preferred Dalziel: which was found, in regard that the King, in the Case of Treason, came in the Earl of Eglingtoun's Place; so whatever was competent to the Earl of Eglingtoun, in the Case of Recognition, or other Feudal Delicts committed against him, was competent to the Kings Donatar of Forfeiture: And that as Recognition would have cut off the Ladies Right, in behalf of the Superior, contracto mating &. fo Treason in behalf of the King. Touvan of mariod talo

XXXV. 21 December, 1682. Tochar.

Cotland as Executor to who was first Husband to Reid, pursued her and her Second Husband for payment of

11. Years. Value explain.

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2000 Merks, which she was obliged in her Contract of Marriage to pay to her deceast Husband, in name of Tochar. The Lords found, in regard the Wife was only partie Contracter for her felf, and that none was burden-taker for her, or obliged with her, for Payment, and that the Marraige did subsist for the space of eleven years, that the Tochar was prefumed to be payed, or that the Husband had as much of the Wifes Means. as did amount to the Sum purfued for.

XXXVI. Eodem Die. Affize of Error.

TIS Majesties Advocat having pursued a Declarator of the Escheat of Baillie Gray and Blair, who were found guilty of Error before inforcing of affine Justice Court; and it being alledged for them, that they had a Reduction of the said Gift, and Act of Adjurnal, upon this Reason, that by the Act of Parliament, no Person was to speak with the Assize after they were inclosed, and that they offered to prove, that the Advocat had spoken hal and with the Members of the Assize, after they were first inclosed: And it be ing Replyed, that if he spoke to the Assize, it was in Presence of the Justices after they had disclosed themselves, returning a Verdict that was not apposite, and that he did only desire, that the Justices would inclose them, till they returned an apposite Verdict, either filing, or cleanfing, and that the Act of Parliament was only to be understood, that the Pursuer or any other Person should not speak with them while they were inclosed, to menace, corrupt, or influence them, but was not to be understood, when the Judge or any Person in presence of the Judge, in manner aforesaid, did speak to them. The Lords sustained the Gift, and repelled the Reasons of Reduction. The meeting of Estates, in april. 1609 place, affection of govern among the Grisban ws. 9.5.

XXXVII. 2 January, 1683. Attester of a Cautioner in a Supension.

2. charge al Charge of R. Robert Colt Advocat having intented a Declarator, against Mr. William Sommervel, to hear and see it found and declared, that he being Remission Attester of a Cautioner in a Suspension raised at the Instance of one Men-King zies against Mr. William, of a Charge of Horning for Payment making of 2000 M.due by the faid Menzies, to the faid Mr. William, that he ought to be free, in regard the Reasons of Suspension were relevant, & true, & particularly that Reason, that the Charge was at Mr. William's Instance, at fer he was sentenced by a Sentence of the Justice Court to die, and that the Sum being made movepay.

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moveable, fell under Escheat, albeit ex post facto, he had gotten a Remission. The Lords found, that the Charge was null, being at the Instance of a condemned Person, and the Reason of Suspension (exclusive of the Charger's Title, the same falling under Escheat) was relevant to exoner the Attester and Cautioner, albeit that now the time of this Declarator, he had gotten a Remission, the Remission being in essect a new Title acquired from the King, which was not in his Person the time of the Charge, or raising the Suspension; but the Lords were of the Opininion, that no Reason of Suspension that were suspensive of the Debt only, such as Arrestments and the like, would exoner the Cautioner, unless it were either exclusive of the Debitor or the Title. This altern by act of the non valent suspensions further program.

XXXVIII. 3d. January 1683. Nottars Subscribing.

JN the Action of Reduction and Improbation pursu'd at the Instance of James Clark, against the Laird of Balgounie, of a Contract past betwixt William Carnagie, and his Children. It was alledged, that the Contract was null, as being sinbscribed by two Nottars, who do acknowledge, that the Party could write: And it being Answered for Balgounie, that he opponed the Subscription of the Nottars, bearing the Instability of the Subscriber's Hand, and that by Reason of his Sickness, he could not write. The Lords resused to sustain the Subscriptions of the Contract, unless Bagounie would offer to prove, in Fortification of the Nottars Subscriptions, that the Partie the time of the subscribing, was sick, and not able to subscribe, and would adstruct the Subscription.

XXXIX. 5 January 1683. Chamberlands Sallarie.

John Grahame, Chamberlane to the deceast Alexander Murray of Meligum, pursues Janet Roghead, as Relict and Executrix for Payment of 6000 Merks, due to him as Chamberlane for several Years; and albeit that he was discharged of his Chamberlane Accompts, yet the same bore a Reservation of all Sums by Bond, Ticket, or otherways due by the Pursuer to the Defunct. It was alledged for the Desender, that the Pursuer was only Negotiorum gestor; and unless Paction were proven, the time of the Entry, to his Service, he could not pursue the Representatives of the Desunct for a Sallarie, after the Chamberlane Accompts were sitted by the Desunct, and a Discharge granted to the Pursuer. The Lords sustained the Desence, and associated the Desender.

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XL. 10 January 1683. Adjudication.

exclines to pont as well as If Er being a Creditor of Edward Ruthven, he did adjudge so much of a Right of Annualrent due by the Earl of Callendar upon the Estate of Callendar, to the said Edward, as did amount to the Payment of his Debt, and a Fifth part more, conform to the new Act of Parliament made anent Adjudications, It was alledged for Edward Ruthven, that there was no Foundation from the New Act of Parliament for adjudging for a Fifth Part more of Annualrents, seeing the Act of Parliament made mention only of Lands; and the Reason of the Act of Parliament was, that the Creditor lay out of his Money, and was forced to take Land, which did not militat in this Case, in respect the Earl of Callendar was personally obliged in Payment of the Money, upon which the Lands were redeemable, and so the Creditor Adjudger might raise his Money. The Lords sustained the Adjudication as to the 5th part more, and found that the Reason of the Act of Parliament extended to Annualrents as well as Lands.

XLI. Eodem die. The Reliet Creditrix by Contract of Marriage.

Allatly having pursued Skeen, as Executor to the deceast Bishop of Wan Billy and T Cathness, for payment of a Debt due by the Bishop, and Skeen having alledged, that the Inventar of the Testament was exhausted by Payment to the Bishops Relict, in implement of her Contract of Marririage: And it being replyed, that fince there was no Diligence done, nor Sentence recovered against the Executors; they ought not to have made voluntar Payment for exhausting the Inventar, to the Prejudice The Lords Sustained, the Payment made to the Reliet for of the Pursuer. implement of her Contract of Marriage, in respect they found, that as to the Executor, it was a preferable Debt, without necessity of a Sentence. Nota, It hath been otherways decided in January 1688.

XLII. Eodem Die. Patronage.

in the assiptend. THe Town of Dundee, having purfued a Declarator, against the Earl of Lauderdale, of their right of Patronage of their Second Minister, upon this Ground, that the Town had been constantly in Use to pay the Stipend, and to call, and present the Second Minister, which they prov

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ed by writes produced, and it being alledged for the Earl, That he and his Authors, Constables of Dundee, being infest in the Patronage of the Kirk of Dundee, if the Town did adjoin another Minister for their Conveniencie, and doted a Stipend for his Maintainance, that could not prejudge the Earl; But it being an accessary Donation, he ought to have the Patronage thereof; and that it was so found expresly, betwixt the Earl of Haddingtoun and Town of Haddingtoun, where in the Competition anent the Patronage of the second Minister, the Earl of Haddingtoun, who was Patron, was preferred to the Town, albeit the Stipend for the most part, was payed by the Town. It was replyed, for the Town of Dundee, that the doting of the Stipend, was one of the ways of Acquisition of the Patronge by the common Law, and that the Practique betwixt the Earl of Haddingtoun, and Town of Haddingtoun, did not quadrat in this Case; for the Possession was dubious and controverted, betwixt the Earl, and the Town of Haddingtoun: But here the Town of Dundee had not only doted the Stipend, but have been in constant Posfession, by presenting and calling of Ministers from time to time, and that the Earl of Dundee, and his Predecessors, who were my Lord Lauderdale's Authors, did never question, nor controvert the samen. The Lords, in respect that the second Ministers Stipend was payed by the Town. and that they had been in Possession, by calling and presenting the Minister without any Question made by the Constables of Dundee, my Lord Lauderdale's Authors, declared in Favours of the Town.

Effect of an Arrestment, Bond of Coroboration a Charge of Horning. A charge of Horning.

Lizabeth Wishart, Relict of the deceast James Bonnar, as Executrix Rein's oren Confirmed to him, and as having Right from Bonnar nearest of Kin to the said James, intented Action against the Earl of Northesk, for payment of a Sum contained in an Heretable Bond, bearing an Obligement to infest, & also a Clause secluding Executors: And also rais'd another Action against the Laird of Morphie, for payment of a Sum contained in hisBondof the same Tenor. There was Compearance made for Miln and Bannatine, who were HeirsPortioners by their Mother, to the Defunct, & craved to be preferred to the Executors, both Sums being Heretable. It was Replyed for the Executors, that the Sums were made Moveable by a Charge of Horning. It was Duplyed for the Heirs, that the Clause secluding Ex-

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ecutors, being the Destination of the Creditor, did exclude the Executors, notwithstanding of the Horning. The Lords found, That Northesk and Morphie's Bonds did belong to the Heirs, notwithstanding of the Charge of Horning, in respect of the Clause secluding Executors: But they found, That the Annualrent of these Bonds did belong to the Executors. Thereafter, it being alledged, that the Anmualrent of Morphie's Bond became Heretable, there being a Compryfing for both Principal and Annualrents. And it being answered for the Executors, that after the Comprysing, the Sums was made Moveable, by an Arrestment at the Comprysers Instance, in an Action to make Arrested Goods forthcoming. The Lords found, That an Arrestment, or an Action for making Arrested Goods forthcoming, did not make the Sums contained in the Appryling Moveable The Executors did infift against Keith of Craig, for payment of a Sum contained in an Heretable Bond granted to the Defunct, in respect the Executors alledged, that there was a Moveable Bond of Corroboration granted by Reith of Craig of the faid Heretable Bond. The Lords found, That the Corroboration did not alter the Nature of the Heretable Bond, but that it remained still Heretable. Exception ocompetent.

XLIV. Eodem Die. Possessory Judgment.

infort of pphy companion. Ant having pursued a Poynding of the Ground of the Lands of Thurstane, for payment of an Annualrent, wherein he flood infeft: And Aikman having alledged, that he ought to have the Benefit of a Possessory Judgment, being infest in the Property of the faids Lands, and seven Years in Possession. The Lords found, That a Possessory Judgment, was only competent, in the Competition betwixt two Rights of Property: But that it was not competent to be proponed against a Right of Annualrent, that being a Right of another Nature, and which was compatible with a Right of Property, and Possession by vertue thereof: But, whether the Tenents should be any further lyable, than what was in their hands the time of the Citation, they ordained that to Sumar Splaint be heard in their own Presence.

XLV. 20 January 1684. Battery pendente lite.

no doit sphrated. to wholemotion to is go a Wethergate, having Charged Stuart of Chambelly, for payment of a Sum of Money conform to his Bond: And Chamno achon well logs of whole bebelly having Suspended, upon several Reasons of Compensation, where-

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of some were found Relevant and proven, but before discusfing of the other Reasons, and before Extracting of the Decreet, Chambebelly having strucken over the Head with a Reed, Maxwel of Nethergate, Maxwel gave in a Bill to the Lords craving, That Chambebelly, upon the Act of Parliament, might lose the Plea, and that the Letters might be found orderly proceeded, and the hail Reasons of Compensation Repelled: Witnesses being adduc'd, and the Fact proven, It was Alledged for Chambebelly, That none of the Reasons formerly discust. found Relevant, and proven, could be Repelled, fuch Reasons, as were Pendent, and not discust the time of the Fact. And 2do. Even as to these Reasons, they could only be Repelled hoe loco. to be received by way of Compensation, but he could not be precluded, by way of Action, to pursue for them. The Lords found, That he ought to lose the hail Plea, the same not baving come to a Period, by Sentence, and refused to reserve Action for these Grounds of Compensation against Nethergate. The English all cald base in for in wandles

XI.VI. 2 February 1683. Recognition.

N the Action of Declarator of Recognition, pursued at the instance in Spuls control of James Buchan of Ockhorn, against James Forbes of Savock : It being alledged, That Forbes of Wattertoun, and Petrie, their base Insestments could be no ground of Recognition of the Barrony of Auchnacoy, because these Seasins, being taken in the English time, when the Casualities of Recognition were suppressed, shortly after the King's Restoration, they required their Money contained in their Rights, and thereby loofed the Wodsets, and that they never possest by vertue of these Rights, after the King's Restoration. And it being Replyed, Thatin taking of the Seafin, without the Superiors Consent, there was Contempt of the Supperior that occasions Recognition: And the Requisition, does not absolutly loose the Wodset; seing, always it is in the Power of the Crediitor to return to his real Right. The Lords found the Defence Relevant. And it was further Alledged, That the Pufuer his Seafin of the Lands of Ockhorn could be no ground of Recognition of the Barrony of Auchnacov, whereof it is alledged thateit is a part, because it was the Pursuers fault that he did not make Application to his Majesty for Confirmation of his Right, and so having omitted to confirm his base Right, it cannot prejudge the Defenders by helping

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to make up the Alienation of the Major part, and so make their Interest to Recognosce. The Lords found, That altho the Purser's Seasin might be a ground of Recognition in favours of a Third Person, yet the Gift being granted to the Pursuer, his own base Infestment could be no ground of Recognition to make up the major Part.

Contract & 2 mariago. XLVII. 6 February 1683. Clause of Conquest in a Contract of Marriage. Lands defore right wood made the

adilional raff N the Action of Declarator pursued by James Wauchop, Son and ap. parent Heir of the second Marriage, betwixt the Laird of Niddrie Ker his second Spouse, founded upon a Clause in the said Nid. complealing squarie's second Contract of Marriage, wherein he was obliged to provide the Children of that Maraiage to 10,000 Merks, together with the haille Conquest Lands during the Marriage, and Subsumed, That the Lands of Lochtouer were Conquest during the Marriage, and that this Nid. drie as Heir to his Father, ought to denude himself thereof in favours of the said James. It being alledged for Niddrie, That he could not be lyable to denude himself of the saids Lands, because the same could not fall under the Clause of Conquest, in regard his Father had both a Right of Wodset thereupon, and two Comprisings, and an Irredeemable Disposition from the apparent Heir of the said Lands. And it being Replied, That after the Marriage, he had acquired preferable Rights to these Lands, and so in tantum the value of these Rights were Conquest. The Lords sustained the Defence for the Laird of Niddrie, That his Father had either Right by expired Apprifings, or by an Irredeemable Disposition: And found, That any Right acquired during the Marriage, altho preferable, did accresce to the former Rights, and was but a compleating of the Conquest formerly begun before the Marriage.

> 9 February 1683. Inhibition and Comprifing. XLVIII.

Purging Inhabitionly
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monthspaine main imperimenty Spring on IN the Action of Reduction, Trotter against Lundie, wherein Trotter having pursued a Reduction upon an Inhibition served against his Debitor, before Lundie obtained his Right of Wadset, from him. Lundie having Alledged, That he could not reduce his Right; because he offered to purge, by payment of the Debt, which was the ground of the Inhibition. And it being Replied, That the same was not purgeable, in regard there was a Comprising led thereupon, which was expir-

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ed. And it being Duplied, That the Comprising could not be drawn back to the Inhibition, so as to have the benefite of an expired Legal, in regard the Defenders Wadfet interveened betwixt the Inhibition and Comprising, and so was preferable to the Comprising as a real Right, and that the ground of the Inhibition was always purgeable by payment. The Lords found, That notwithstanding the Comprising was expired, yet, that theInhibition was always purgeable by payment of the Principal and Penalty contained in the Bond, and refused to make the Defender liable either for the accumulat Annualrents, or Sheriff-fies contained in the Comprising.

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XLIX. 14 February 1683. Improbation.

IN the Action of Improbation pursued by Sir Robert Murray against was Murray of Burghtoun, The Lords Sustained indirect Articles of Impro- photocolory with Conding that the direct were extant and that the Witnesses while for the direct were extant and that the Witnesses while the direct were extant and that the Witnesses while the direct were extant and that the Witnesses while the direct were extant and that the Witnesses while the direct were extant and that the Witnesses while the direct were extant and that the Witnesses while the direct were extant and the witnesses while the direct were extant and the winnesses while the winnesses while the direct were extant and the winnesses while the bation, notwithstanding that the direct were extant; and that the Witnesses infert had bidden by and approven, and upon the Probation of the indirect Articles, did find the Witnesses, who had been examined in Ireland, falsed & not remissed to just feign'd. But the Speciality in this Case was, That the Witnesses themselves were dead, and not examined before the Lords of Session here, or by their Commission, but allennarly the Extracts of the Depositions taken in a Civil Pursuit before the High Court of Chancellary in Ireland, translated here. and that the Witnesses were viles personæ, and not of intire Fame, in this Process. The Lords ordained the Writs improven, which were a Lease and Release of certain Lands in Ireland, to be torn and destroyed, albeit it was alledged, that the Subject Matter was Lands in Ireland, and fo not subject to the Lords Jurisdiction, and that there had been several Sentences in Burghtoun's favours in the Courts of Justice in Ireland, which was repelled, in respect the Writs were made in Scotland: And that by a Return from the Judges in Ireland to the Lords of Session, the Irish Judges declared, that Scotland being the place where the Writs were made, the Judges in Scotland were the most proper Judges for improving thereof in this Process: Likeas, in regard it did not appear by the Probation, that Burghtoun had any Accession to the Act of Forgery, but allennarly was User thereof, and had subscribed to bide by. The Lords refused, by this Sentence, to find him Art and Part of the Forgery, or to recommend him to the Justices. Podr Coapido on 2 desvere sursa ave TenL. 20

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L. 20 February 2683. Compryfings.

IN the Action of Mails and Duties, pursued by the Laird of Beirfoord against the Tennents of Craig, Sir James Turner having compeared and craved Preference, in regard he being a Compryfer, was first intest, and that Beirfoord, who was the other Compryser, could not come in pari passu, unless he payed the Expenses of his Infestment, conform to the Act of Parliament, and also 1000 Pounds of Expenses, for changing the Holding of the faid Lands, from Waird to Taxt-Waird. And it being Replyed for Beirfoord the other Compryser, That the Act of Parliament appointed the first effectual Appryser, to be reimbursed of his ordinary necessary Expenses in expeding of his Insestment, but made no mention of the Expenses of Taxing. And Beirfoord declared, That he led made no use of the Taxt-Ward Holding. It was further alledged for Sir James, That his Comprysing being expired, he behoved to pass a new Infertment, conform to a Chuse in the end of all Charters obliging them fo to do, at the least, he ought to have Allowance of so much of his Expenses expended in the changing of the Holding, as was necessary for passing an ordinary second Insestment upon the expired Apprysing. The Lords refused to allow the Expenses of the changing of the Holding, being restricted to the ordinary Expenses of a simple infestment after the expiring of the Comprysing, in regard the second Insestment would not be profitable to the other Compryfers, feeing after the Expiration of the Legal, they behoved to expede Infeftment upon their own Compryling.

LI. Eodem Die. Astion of Relief.

of Brigtoun, with absolute Warrandice from all Perils and Inconder working the working the working likeways certain Lands Disponed to
law thin, in Warrandice of these Lands, the principal Lands being
evicted by a Designation for a Ministers Gleib, Bonner pursues an Action
of Recourse against the Warrandice Lands. And it being alledged for
Lyon of Brigtoun, That Minor non tenebatur placitare. 2do, Although
he were Major, yet the Lands principally Disponed being Kirk Lands,
which of their own nature are lyable to be designed, the Clause of Warrandice

randice cannot be thereto extended, Warrandice being only in relation to the Right; and this being inherent to the nature of the Lands, and not any Defect of the Right, he could have no Recourfe. The Lords found, That the Clause of Warrandice being an absolute Warrandice against all Perils and Inconveniencies whatsoever as Law will, and that this Eviction not having proceeded from any supervenient Law, but according to the Law standing the time of the Disposition, they repelled the Defence of Minor non tenebatur placitare, and also the other Defence foresaid, and they sustained the Action of Recourse against the Warrandice Lands.

22 February 1683. Substitute in a Bond.

contract of mariago N the Competition betwixt Bonner and Arnot, the deceast Bonner of Greigstoun, in his Contract of Marriage with Arnot, being obliged, to imploy for himself and his Wife in Liferent, and the Children to be procreat betwixt them, which failzieing in favour of himfelf, his Heirs and Affigneys, the Sum of 30,000 Merks due by to the faid Arnot his Spouse, by Bond, which she had assigned to him, by Poner to after the said Contract in name of Tocher, as also the Sum of 6000 Merks of his own Money; Bonner having only a Daughter of the Marriage, in implement of the said Contract, dispones amongst other Debts, the foresaid Bond assigned to him by his Wife as said is, in contrary into the favour of his Daughter, and failzieing of her by Decease, the one half to his Brother Greigstoun, and the other half to the said Arnot his Relict: And in his Disposition, there is a Clause in these Terms, And it is hereby provided, in case the said Daughter shall die without Heirs of her Body, be, per verba de presenti, assigned the said Bond in favours of his Brother and Relief foresaid. The Debitor of the said Bond, having raised a Suspension of a double Poynding against the now Greigstown, who is the Person Substitute in the said Assignation, the Daughter being deceast without Heirs, and against Arnot of Mugdrum, who claimed Right to the said Bond, as Executor and Legatar by the Daughter, who lived until she was fourteen years of Age, and legat the faid Bond to him, it being Moveable. It was alledged for the Uncle Greigstoun, That he ought to be preferred, in regard she died in her Minority, and could not by a Testament, or otherways gratuitously, or without any Onerous Cause, prejudge him, who was Substitute by the Father to her, in case of her Decease, and to whom

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the Father, in the Terms foresaid, had made a Conditional Assignation. It was Answered for Arnot of Mugdrum, That this Sum being Moveable, the Daughter, in her Minority, might dispose thereupon by Testament. notwithstanding of the Substitution, especially seing by the Mother's Contract of Marriage, his Daughter was Creditor to the Father, he being obliged to provide the same to the Children of the Marriage, and failzieing of them, to his Heirs, and so could not limit his Daughter, who was the only Child of the Marriage, by granting to his Brother, and Relict, a Conditional Assignation in the Terms foresaid. The Lords found, That notwithstanding of the Antecedent Obligement in the Contract of Marriage, yet the Father might fulfil the Contract to the Daughter, and grant a Substitution, and conditional Assignation to the Daughter in favours of the Brother, who was his appearand Heir of the Family, and which Substitution, or conditional Assignation. could not be prejudged by the Daughter, in her Minority by Testament. or otherways, without a necessar or onerous Cause, and so they preferred the Uncle who was substitute, to Arnot of Mugdrum who was the Legator: This thereafter being called in presence, the contrary was found. confirman.

LIII. 23 November, 1683 Recognition.

base met Winker N a Declarator of Recognition, pursued by his Majesties Advocat, against Inflerent the Creditors of the Laird of Crommertie, It was alledged, that base Infestments, consirmed after a concourse of others, extending to the Major part of the Lands, before the Gift, could not fall under Recognition, neither could whom the stall in computo, to make up the Major part, lo as to make the rest recognosce. The Lords found, That tho the Confirmation did secure the Infestment confirm'd; yet before Confirmation, the Major part being alienated: and so jus being regi acquisitum, the same behoov'd to fall in computo, to make ithe rest of the Lands recognosce It was further alledged, That Crommertie the common Author, having obtained a new Infestment with a novo damus, any base Insestments anterior to the novo damus, could not enter in compute, with the subsequent base Insestments, to make up a Ground of Recognition, seing the novo damus, was an original Right: And it being replyed by the Kings Advocat, that a novo damus did sufficiently secure the Vassal, and did denude the King of any Recognition fallen: But there being no Recognition fallen the time of the nove damus, the base Insestments that were anterior, being less than the half, the novo damus could not flop

stop the Concourse of the Antecedent base rights with the subsequent. The Lords found, That albeit there was no punishment inflicted by the Law of the Kingdom, until the Major part was alienat, yet the Alienation of any part of the Feu, without the Superiors Consent, was an Inchoat delict, and that the novo damus was virtually a Confirmation of all the anterior base Rights, and therefore found, That the novo damus did secure the Vassal, so that antecedent base Insestments could not enter in computo, nor be a Ground of Recognition, with subsequent base Infestments to make up the Major part. It was alledged, 3tio. That iii. fuch base Insestments as were out of both Feu, Ward and burgadge Lands. or out of Lands belonging to feveral Heretors, to wit Cromerty and my Lord Tarbat, they being correi debendi, cannot be grounds of Recognition for the hail Value of the Sums therein contained, but allennarly for a Proportion of the Sums effeiring to the Ward Lands, being compared with the other Lands, in regard, that albeit the Creditor might take himself to the Waird Lands for the hail, yet there was a proportional real Right of Relief competent out of the rest of the Lands. The Lords, in respect it was optional to the Creditors to uplift the whole Annualrent out of the Waird Lands, therefore they sustained these Rights, for the hail Value of them, to be Grounds of Recognition. It was, 4to, Alledged, That such base In-IV. feftments, as were granted under Trust, notwithstanding whereof, the Granter remained in Possession of the Lands; and the Writs were undelivered, (being in the Granters Charter Chist,) ought not come in computum. It was answered by the Advocat, that the Superior was not concerned what Trust was betwixt the Granter and Receiver, and these qualifications were not relevant, seing baie Infestments, without being clead with Possession, is a sufficient Ground of Recognition, and the Grounds being lying in the Disponers Charter Chist, were not sufficient, seing they might have been delivered and redelivered back again: And if that were sustained, it would evacuat all Recognitions. The Lords repelled the Objection thus qualified, and sustained the Grounds of Recognition. for. D.lix. clausade valion

LIV. 27 Feburuary 1683. Contract of Marriage and the jus mariting claused minor.

He Countess of Leven with Consent of her Curators, having entered into a Contract of Marriage with Mr. Froncis Montgomery, wherein the provided him in Liferent, to the Barrony of Inchlestie, in case there should be no Children of the Marriage, or in case the Children should de-

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cease before Mr. Francis, that was declared to be in Satisfaction of his Courtely of the whole Estate: As also, by the said Contract, it is provided, That in case she should have Children surviving himself, by the was to have the Liferent of the whole Estate, only he was to Bay the current Annualrent of the Debt: And by the Contract, the Lady with Consent of Mr. Francis, was impower'd to burden the Estate with 10000 Merks, for providing her House with Plenishing, and Mr. With 10000 Merks, for providing the life Viscount of Kenmoor, to apalmoly 50000 Merks, which was his Portion, for payment of the Debts, and in case the Marriage should dissolve without Children, the Lady and her Heirs were obliged to refound the faid 50,000 Merks to Mr. Francis, after her decease, according to the Terms of the said Contract. The Lady, with Consent of Mr. Francis, granted Bond to Lauchlan Leslie, for 10000 Merks. The Lady,upon Death-bed, ratifies the foresaid Contract of Marriage upon Oath, and also the foresaid Bond for 10000 Merks, which the had granted upon Death-bed . She also upon Death-bed grants a Difcharge to Lauchlan Lestie her Chamberlain, of his Intromissions with the by-gone Rents of the Lands, and at the same time dispones her half of the Moveables, which was in common betwixt her and Mr. Francis, and delivered to him all her Jewels, and particularly, a Jewel which was gifted by the King of Sweden, to General Leslie her Grand-sather as a Token, and which her Grand-father did legat to the Family, with a Prohibition not to Alienat, but that the famen should remain with the Family of Leven. The now Earl of Leven, being ferved Heir of Tailzie to the faid Countels, has intented Reduction of the faid Contract of Marriage, and of the faid 10000 Merks Bond, and a Declarator, that the bygone Rents, and Moveables belonging to the Lady, the time of the Marriage, should not belong to the faid Mr. Francis, jure mariti, but should be applyed, for payment of the moveable Debts, which were due before the Marriage, and also concludes a Reduction of the Discharge and Disposition foresaid, as being to the prejudice of the Heirs Relief of moveable Debts, and concludes, that the King of Sweden's Jewel, may be delivered back, as being provided to remain with the Family, and that the other Jewels, being of several kinds, did fall to Leven, as being Heirship, at the least, as being Parapharnalia, belonged only to the Wifes Executors, and confequently was lyable for her Debt, and so, to relieve Leven the Heir of moveable Debts. There is also a contrair Declarator pursued at Mr. Francishis Instance, The Reason of Reduction

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ction insisted on by Leven, was against the Contract, that the samen was granted in the Ladies Minority to her Lesion; and whereas it bears. that the Barrony of Inchlesly was provided to Mr. Francis in lieu of the Courtefie, Curators could not transact in relation to a contingent event, the Courtese not being likely to have fallen out, she being a fickly Lady, and affected with a Rupture, who by the Judgement of Physicians and skil'd Women, was not fit for Marriage, and that the Transaction was not equal, being only in the case, that either there should be no Children. or that the Children should die before the Father; but in case the Children should live, then he was to have the Liferent of the whole Estate. without Restriction; The Lords found, That the Lady and her Curators might provide Mr. Francis her Husband, to a competent Liferent, and might transact in relation to the Courtesie, and that this Provision was not exorbitant. The second Reason of Reduction, was against the 10,000 lib. Bond as granted likewise in her Minority, and to her Lesion. seeing Mr. Francis being her Husband, ought to have provided the moveables for the House, and that the Heir could not be burdened therewith, seing there was sufficiency of bygone Rents in the hands of the Tenents and Chamberlanes, which ought to have been applyed for furnishing of Plenishing, and that Mr. Francis had carried away the Moveables bought. The Lords sustained the of Reduction against the 10000 lib. Bond, and ordained Mr. Francis to discharge the samen, and him to brook the Moveables alledged bought therewith, and declared these Moveables should not fall under the division, so as the Heir could Claim a part thereof, as falling under the Ladies Executrie, for his Relief of Moveable Debts. The Third Reason of Reduction was, That the Contract of Marriage ought to be reduced, because the Curators had omitted to provide thereby, that the bygone Rests of Rents due by the Tennents and Chamberlanes, which were eight or nine years Maills and Duties, should have been applyed for payment of the Ladies Debts, viz. Compts and bygone Annualrents, and that by that Omission, the same did full under Mr. Francis's Jus Mariti, at the least, Mr. Francis, ought to be lyable to the Heir, for his iRelief in quantum factus est locupletior by the jus Mariti, and that the jus Mariti in Law, gave the Husband only Right to the Wifes Moveables, her moveable Debts being first deduced. The Lords found, That the Wifes Moveables that fall under the jus Mariti, could not be burdened with the Wifes Debt but in a Subsidiarie way, the Heretable Estate and Executrie being

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ing first discust and exhausted, in regard, they found the Husband not tyable after the Wife's Death for her Debts, fo long as there was any Heretable or Moveable Estate belonging to her Representatives, which might Tatisfie her Debts, the jus Mariti, being equivalent to a General Affignation of the Wifes Moveables, to the Husband, and which could not be quarrelled at the Creditors instance, so long as there was Sufficiency of the Estate for payment of her Debts. Likeways in this Reduction, Leven craved that the Disposition in savours of Mr. Francis by the Lady, of the half of her Moveables in common betwixt them, and the Discharge granted by her, with Mr. Francis's Consent, to Lauchlan Leslie, ratified by her upon Oath while she was on Death-bed, might be reduced, in regard these Deeds being done on Death-bed, could onby he sustained as Legacies, and so could not prejudge the Heir of his Relief of the Moveab e Debts. The Lords reduced these Deeds, in so far as they were prejudicial to the Heir's Relief of Moveable Debts, and that notwithstanding of the Ratification by the Lady upon Oath, which they found only Personal, but that it could not bind up her Heir from quarrelling of the same. In this Process there was likeways a Conclusion of Dec arator, craving the King of Sweden's Jewel foresaid to be delivered to the Pursuer, in regard the deceast Earl of Leven left it to the Family, with the Quality, that it should not be alienat. The Lords ordained that lewel to be restored back, but assoilzied Mr. Francis from giving back the rest of the Jewels, they being Parapharnalia, and found, That the Lady might dispose thereupon, in favours of her Husband, and that the same was not subject to the Heir's Relief, as other Moveables were.

LV. 28 Eebruary 1683.

A Bond secluding Assigneys.

He deceast Colonel Barclay having granted a Bond to James Saintclair his Nephew, for a Sum payable to himself, secluding Assigneys, and providing, that in case James died without Heirs of his own Body, the Bond should be null: The said James Saintclair, being Alimented by the Bishop of Brechin, who had married his Mother, he grants an Assignation of the said Bond, to the Bishop, bearing in the Narrative thereof, That the Bishop had Alimented and Educat him. James Strachan, the Bishops Son and Executor, did pursue the Colonel for payment of the said Sum assigned. And it was alledged for the Colonel, That the Bond was not assigned. And it was alledged for the Colonel, That the Bond was not

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affignable, seing Affigneys therein were expressly secluded, and that there was an express Provision therein, that the same should return to the Colonel, in case the said James should die without Heirs of his Body, which de facto sell out. It was Replyed for Strachan, That the foresaid Clause did only bind up the Defunct, that he should not assign without an Onerous Cause: But the Cause being here most Onerous, viz. His Aliment, the Assignation ought to be sustained. The Lords found, That Clauses of that nature did not bind up the Party from assigning for Onerous and Necessary Causes, and therefore sustained the Assignation, and ordained the Pursuer to prove the Bishop's Alimenting of Saintclair the Cedent.

LVI. Primo Martii 1683. Effect of a Charge of Horning.

Bonnar, Ballantain & Miln his Heirs, anent two heretable Bonds granted by the Earl of Northesk, and Laird of Morphie, which Bonds bore not only an Obligement to Infest, but likeways a Clause secluding Executors. The Lords found, That a Charge of Horning made these Bonds so moveable, that notwithstanding of the Clause secluding Executors, yet they did belong to the Executors, sicklike, as if the foresaid Clause had never been insert in the Bonds, in regard, that by the Charge of Horning the Creditor had sufficiently declared his mind to have up his Money from the Debitor; in which Case, if it had been lying by the Defunct, it would have belonged to the Executors, and that the Debitor's not making payment in obedience to the Diligence, could not be prositable to the Heir so as to keep the Money still Heretable. This Interlocutor was pronunced upon a Hearing in Presence, and hereby, they alter'd a former Interlocutor given upon a Report from the Outer-House. See Desire

LVI 6 March 1683.

Compt and Reckoning in Comprisings.

Nan Action of Compt and Reckoning, pursued by Mackbraer of Netherwood, against Romes, for extinguishing a Comprising, as being satisfied within the Years of the Legal. The Lords found, That Tacit Relocation was interrupted after the expiring of a Tack by a Pursuit, for greater Mails and Duties than was contained in the Tack, in regard the Summons bore payment of the Duty in time coming, and therefore E 2

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the Compriser was found Comptable, for the ordinary worth of the Lands, as it was proven after Citation upon the faid Summons.

LV. Eodem die Moveable Bond.

on Rod to grey sion. having pur-Ollock as Executor to fued for payment of a Sum due by Grant to the Defunct, which Bond was an ordinary Bond, payable at a Term, and bore this Provision, That it should not be lawful to the Granter the Debitor, to redeem a Wodfet which he had formerly granted for an other Sum, unless he made payment of this Sum likeways, which is declared to be eiked to the Reversion. It was alledged, That this Sum, altho conceived in the Terms of a Moveable Bond, yet bearing to have been eiked to the Red version of a Wodset, was Heretable as the Sums upon Wodset. answered, That the said Bond was Moveable, payable at a certain Term, and the samen not being Registrat in the Register of Reversions, the nature of the Bond was not altered. The Lords found the foresaid Bond, albeit containing an Eik in the Terms foresaid, remained Moveable, and belonged to the Executor, in regard, it is none of the species of Heretable Bonds, contained in the Act of Parliament 1661, as, not feeluding Executors, nor bearing a Clause of Infestment.

LVI. 7. March 1003. Devices by my Lord Living stown, as 2.1662 Poshe who was Donator to the Forfaulture of It was alledged, That there could be no Process sustained upon the foresaid Gift of Forefaulture, it being a Forefaulture in absence, before the Lords of Justiciary, and the samen not declared, and that the Act of Parliament appointing Forefaulture in absence before the Justice General, does not priviledge Decreets of that Nature, more than there had been Compearance, and if there had been Compearance, the famen ought to have been declared. The Lords sustained the Defence, and found, That the Decreet ought to be declared, not being a Decreet in Parliament. Jos. Gran. Jair. bos. 11. Coff cre hery to upleft

LVII. 10 March 1683. Das to pay Substitution a in Bond, and Tailzie of Moveable Sum.

Rummond of Milnab, having granted Bond to William Riddoch Younger, and the Heirs to be Procreat of his Body, which failzie-2000 infriming & tallys

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failzieing, to William Riddoch Elder, and his Heirs, which failzieing to David Riddoch, his Heirs and Assigneys whatsomever, with this Provifion, That it should not be lawful to William Riddoch Elder or Younger, either of them, or their Heirs, without Consent of David Riddeck, touplift the Sum contained in the faid Bond, or to do any Deed in prejudice of the said Tailzie: As also, That it should not be lawful to the Debitor to make payment; Notwithstanding whereof Drum-Drummond the Debitor, having made payment of the said Sum to Williams Riddoch Younger, who was Substitut, and obtained his Discharge: John Riddoch, Grand-child to the said David, as Affigney by Progress from David, to the foresaid Substitution (which was then but spes succesfionis, William Riddoch Younger the Person Institut, being alive) intented Process for making up a Tenor of the said Bond, which was delivered up the time of the foresaid payment; and accordingly the Bond by a Decreet in foro is made up. The faid William Riddochs Elder and Younger, and the said David being deceast, there is Processintented, at the instance of the said John Riddoch, against the appearand Heir of the Debitor. for payment. It was alledged for the Defender, That he could not be lyable, because he had obtained a Discharge upon payment made to William Riddoch Younger, who was Fiar of the Sum, and consequently might uplift and Discharge the samen; and that the foresaid Clause prohibiting the uplifting of the Money without Consent of David, was only a confilium, and did not stop the Fiar to uplift, and apply the the famen for his necessary Use, such as to pay his Debts, or 2do. That the Pursuer could have no Right there-Marry his Daughter. to, unless he were served Heir to William, who had discharged the samen, and so would be lyable to warrand his Deed. And it being Replied, That the foresaid Clause of the Bond, was not only a Confilium, but was conceived in favours of David, and his Heirs, for the fecurity of the And to the 2d. That the Pursuer was content to serve Heir of Tailzie, either to David or William, and so would only be lyable to Deeds relating to the Tailzie, but could not be lyable to warrand Deeds which did infiringe the Tailzie, such as the Discharge above-written. The Lords found, That in respect of the foresaid Clause of the Bond, prohibiting the Debitor to pay, or the Creditor to uplift, without confent of David, that the voluntar payment was Unwarrantable: And found, That albeit the Pursuer was served Heir of Tailzie to the Granter of the

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Discharge, yet he would not be lyable to warrand the said Discharge, nor to warrand any Deed tending to insring the Tailzie, albeit he might be lyable to other Deeds of the Desunct.

LVIII. Eodem die.

Competition betwixt a Disposition and Apprising.

IN the Competition betwixt Janet Aikenhead, Relict of Adam Nisber, pretending Right to the Lands of Easter-Crichtoun, by vertue of a Comprising led against the common Debitor, which was within Year and Day to a Comprising, in Baillie Justice his Person, whereupon the Superior was Charged; and Baillie Justice pretending, Right to the saids in kindling Lands, by vertue of a Disposition granted by the common Debitor, beadvancing, raim fore denuncing of the Lands to be Apprised, and Confirmed by compellion the Superior, after a Charge upon the Comprising against the same Superior. It was alledged by the Compriser, That the Charge against the Superior, was equivalent to an Infeftment, and confequently being prior to the Confirmation, was preferable. It being answered, That a Charge against a Superior upon a Comprising, albeit it was equivalent to an In-Testment in the Competition of Diligence betwixt Comprisers or Adjudgers amongst themselves, and did so bind up the Superior, that he could do no Deed to preferr one to another; yet it was not equivalent to an Infestment in the Competition with a voluntar Right, such as this is, especially the Disposition, which is the Ground of the voluntar Right, being before the Denunciation of the Apprising, and the nature of voluntar Rights, being such as cannot be compleated by Diligence without a Superiors Consent, the Superior at any time may Confirm them, even after a Charge upon a Comprising, and that, if it were otherways, it would tend to unhinge a Purchasser's Securities, there being no Record of Charges upon Comprisings against Superiors. The Lords, in respect that the Disposition was prior to the Denunciation of the Apprising, preferred the voluntar Right, compleated by Confirmation of the Superior. albeit posterior to the Charge upon the Comprising, in regard They found, That the Charge was only to be considered in the Competition of Diligences among themselves, but not with voluntar Rights.

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LIX. 15 March 1683. Assignation upon Death-bed.

IN the Competition betwixt Sandilands and Sandilands, It being alledged, That the Pursuers Right was an Assignation to a moveable Bond upon Death-bed, and so ought to be consirmed. It was answered, That albeit an Assignation was granted upon Death-bed, yet it was granted and modum inter vivos, and intimat before the Granters Death, who was thereby denuded, and that a moveable Right, such as the Bond assigned, was Transmissable by an Assignation and Intimation upon Death-bed. The Lords found, That in this Case, where the Granter had neither Wise nor Children, who might pretend they were prejudged, that the Assignation and Intimation, albeit upon Death-bed, did sufficiently Denude and Convey, without necessity of Consirmation.

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LIX. 15 March 1683. Recognition.

398.52 . liii. IN the Declarator of Recognition, pursued by Sir John Hay against the Lairds of Pourie, and Phinhaven, The Lords found, That the Infeftment of Relief by Muirie to Ballegerno, (bearing, that Ballegerno, as Cautioner, was distressed for the particular Sums mentioned in the Bond, and therefore, he Disponed the Right of Annualrent, out of the Lands, for his Relief, and declared the Cautioners Entry to be at a certain Term therein-mentioned, and that the Cautioner should apply what he should uplift for payment of the Creditor,) was a sufficient Ground of Recognition quoad valoremof the Annualrent: Notwithstanding it was alledged, That the Cautioner, or at least the Creditor, (from whom the Cautioner derived Right)as being Executor Creditor to the common Debitor, might get Payment and Relief otherways. It was likeways alledged for Phinhauen, That the Lands of the Mains of Errol, could not fall under Recognition, because Kininmonth of Hill, since the Infestment was granted to Phinhaven, had refigned the faids Lands, which imported the Superior's Confent: Likeas, within four or five Weeks, he had, upon that Refignation, expede his Charter, which was equivalent to a Confirmation, after which, the Superior could not gift the Recognition to his prejudice, and that posterior Deeds could not concur with anterior ones, to make up the Alienation of the major part; It was Replyed, That the Vassal was not Denuded, either by the Refignation, or by the Charter, but that base Insestments, taken before Seaun

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That there was a difference betwixt a Confirmation, and a Resignation, seing that the Superior, by the Confirmation, did consirm a real Right, which had been done without his Consent, but in Resignation he did not so. The Lords found, That Resignations past in Course, and therefore could not stop the Recognition, and were not equivalent of Confirmations:

11. But they found, "That after Seasin upon the Charter, which did import the King's Consent, no base Rights granted by the Vassal, could concur to make up a Recognition, to the prejudice of Phinhaven's Right.

LX. 20 March 1683. Recognition.

N the Declarator of Recognition, pursued by Sir John Hay of Muirie against Phinhaven and others. It being alledged for Phinhaven, That that parcel of the Lands of Muirie, whereto he had Right, could not fall under Recognition, because they were resigned in the Superior's hands, upon a Procuratory from the common Author, before the Alienation of the major part, and that he was in a Course of Diligence, having past his Charter within five or six Weeks, and taken Seasin thereupon, so that no Partial Deeds, after this Seasin, could be a Ground of Recognition to prejudge him. (2do,) That his being infest upon the Charter of Relignation, sufficiently secured him against the Recognition, seing the Infeftment of Resignation was equivalent to a Confirmation, as was found, in the Case of the King's Advocat against the Creditors of Cro-D. lin. R. p.30. marty, and that a Confirmation, after the Alienation of the major part, did secure it self, albeit it did come in computo, to make the rest recognosce. It was Replyed for the Pursuer, That Infestments of Resignation pass in Course, and the Superior did not consider the Casuality of Recognition, whereas, in the Case of Confirmation, he behoved to have that Casuality in view, seing he confirmed the Right, which, ab initio, was granted without his Consent. The Lords repelled the Defence, and found, That an Infeftment of Relignation, albeit before the Gift, did not secure

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LXI. Eodem Die. Tack of Teinds.

Stuart of Ascog, and Stuart of Archatton, of a Tack of Teinds set by the Bishop's Predecessor, to the saids Persons, which Tack bore, that the saids

act. 9. P. 1660

saids Teinds, were Rental Bolls payed to the Bishop and his Tacksman. and that the Victual was converted to 20 fs. the Boll. The Purfuer having Insisted upon this Reason of Reduction, That the Tack was in Deminution of his Rental, and contrair to the Act of Parliament 1585, whereby all Conversions are discharged. It was answered, Albeit the Tack bore Rental Bolls, yet they were never payed to the Bishop, as appears by a Tack in 1606. fet by Bishop Knox, to an English Man, for payment of a certain Silver-duty, without relation to Bolls, and that this Tack was prefumed not to be in Diminution of the Rental, being immediatly after the Act Anno 1606, anent Dilapidations made by beneficed persons. And it being Replied, That the Tack quarrelled, bore the said Teinds were Rental Bolls; and also a former Tack in 1665. bore the fame, and by a Declaration under the hands of the Heretors in 1636. when the Annuity was statuted, they declared that these Teinds were set for Old Rental Bolls, payable to the Bishop. The Lords found, That by the two Tacks, and Declaration foresaid, these Teinds were Rental Bolls; and the Conversion in the Tack quarrelled, was a Contravention of the Act of Parliament 1585. and therefore reduced the faid Tack.

> LXII. Eodem die. Prescription of Actions for payment of Teinds.

IN the Action pursued by Isobel Hamiltoun, Executor to the deceast Conoctony law. Bishop of Galloway, against Herries of Mobie, for certain Teind Duties, due by the Defender to the Bishop before his decease. alledged for the Defender, That this Action was prescrib'd by the Act of Parliament 1669. anent Prescription of Ministers Stipends not being purfued within five Years after they became due. And it being Replied. That that Act concern'd only Ministers Stipends, which in effect were Alimentarie, and were prefumed not to ly over unpayed, but could not be extended (being a Correctory Law) to Bishop's or other Titular's Teind-duties. The Lords found, That the Act did only extend to Minister's Sipends, or Teinds due to the inferior Clergie, but could not be extended to Teind-duties due to the Bishop, or other Titulars. act. 62. P. 1661.

LXIII. 22 March 1683. Debitor and Creditor. N the Action of Compt and Reckoning, pursued by the Earl of Mar- supply Duty shal, against his Wodsetters, for Superplus Duties, wherein the Earls

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Earl's Title was as Donator to the Single and Liferent Escheat of his Brother, who had intented Process in the Year 1665. against the Wodsetters: As also, as having Right to the Reversion, by vertue of severalComprisings. It was alledged for the Defenders, That they could not be lyable fince the time of intenting the late Earl his Process, in respect, the deceast Earl never made to the Defenders offer of Surety for their Annualrent in the Terms of the Act of Parliament anent Debitor and Creditor. 2do. That albeit the Purfuer did offer Security in Anno 1679. yet the famen was not sufficient, whereupon the Defenders could rely and quit 3tio. That they could not be lyable to the Pursuer to their Possessions. Compt, unless he would come in place of the late Earl, and be lyable in the Requisition, because the said Act of Debitor and Creditor bears, in case of the offer of Security, that the Wodfetter shall be lyable to Compt during the not Requisition or Redemption, which supposes the Pursuer for the Superplus duty, to be always lyable in case of Requisition. It was Replied for the Earl, That the Defenders ought at least to be lyable fince the date of the offer of Security, in respect there was no Objection against the Caution then offered, and the Pursuer being a Singular Successor in the Reversion, ought not to be lyable in the Requisition. The Lords found the Defenders lyable, since the date of the offer of Caution, in case the Earl either upon Requisition, or Premonition, should redeem the saids Wodsetters within five years after the date of the Interlocutor; but in case he did not redeem within the space foresaid, then they were obliged to allow him the Superplus Duty when redeemed.

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LXIV. 28 March 1683. Conjunct Fiar.

IN the Process pursued at the instance of the Earl of Dumfermling, as having Right from his Father, who was Heir Served and Retoured to his Grand-mother, intented against this Earl of Callander, as representing his Uncle, who was obliged to provide the half of the Conquest dura ing the Marriage betwixt the Lady and him, to her and her Heirs, in case there should be no Heirs of the Marriage surviving. The Lordsfound, the Obligement to provide the half of the Conquest to his Lady, and her Heirs, did state him only to be in the case of a Conjunct Fiar, and so could not cut the Woods for selling except for necessar use. for Sorgiplus Duties, wherein the

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LXV. 6. November 1683. Escape of a Prisoner.

Idean Schaw having pursued Mr. John Vanss keeper of the Tolbooth Inhimating to keep of Edinburgh, for payment of the Price of certain Books stollen by Duncan Campbel from him, upon the account that the said Duncan Campbel by a Subscribed Declaration under his hand, had acknowledged, that he had Stollen the particular Books mentioned in the Declaration. and several others in General, for which he declared, he deserved to be Hanged, and being thereupon by Order of the Baillies Incarcerat in the Tolbooth of Edinburgh, he was suffered to Escape. It was alledged for Mr. John Vanss the Defender, That he could not be lyable for the Price of the faids Books, because there was no Record of the Imprisonment. neither was the Cause of the Imprisonment, intimat to him or his Clerk. either by Word or Write. 2do. That the foresaid Declaration did not prove against him, in regard it was Extrajudicial, and done in Campbel's Minority, and that he had raised a Reduction thereof upon Minority and Lesion, which he repeated. 3tio. That altho the foresaid Declaration were fustained, yet it could only prove against the Desender, as to the particulars therein mentioned; but the Pursuer, could not have juramentum in litem against him, upon the General Clause. The Lords found in this case, Campbel being Imprisoned for Thest, there was no necessity that the Pursuer should prove that the Cause of the Imprisonment was Recorded in the Clerk of the Tolbooths Books, or that there was an Intimation to the Keeper of the Tolbooth thereof: But found, That Campbel being Incarcerat by the Order of the Baillie, the Defender ought to have detained his Person in Firmance, and therefore having suffered him to escape without any Warrand, he was lyable to the Pursuer for the Damnage. The Lords Repelled the Reduction upon Minority and Lesion, and found the Confession probative as to a Civil Effect for Restitution of the Books, therefore decerned for the particulars mentioned in the Declaration, but refused to take the Pursuer's Oath in litem in relation to the General Clause contained in the Declaration, as to what other Books were Stollen from him. D.xcii.

LXVI. 20 November 1683. Reduction and Improbation.

IN the Action of Reduction and Improbation, pursued at the instance charge ag of Fleeming against Carstairs of Kilconquer of a Comprising, and Charge F 2 against

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against the Superior thereupon, to which the Desenders Father had Right by Disposition. It was alledged for the Desender, That he was Minor, and so non tenetur placitare super bæreditate paterna. It was Replied for the Pursuer, That this was not bæreditas in persona patris being only Conquest by the Father. 2 do. The Father was not Insest. 3 tio. That the Desender was not served Heir to him. The Lords found, That the Comprising was bæreditas paterna, altho it was Conquest by the Father and so sell under the axiome of bæreditas paterna albeit the Father was not Insest, there being a Charge against the Superior used by his Author: But the Lords found, That the soresaid Desence was not Competent to be proposed by the Desender, who was only apparent Heir, and not served Heir.

LXVII. Eodem die.

len years.

Redeemption of a Comprising acquir'd by an appearand Heir.

wo mode. I N an Action pursued by Mauld'of Mains, contra Mr. Patrick Craw. wherein Mr. Patrick was conveened, as representing his Father, by possessing his Estate. It was alledged for the Defender, That any Intromisarg. as as use fion he had with the foresaid Estate, was by vertue of an Apprising whereto he had Right, and Ten Years being Elapsed since his Acquisition thereof, was not now Redeemable from him, as appearand Heir, by his Father's. Creditors, upon payment of the Sums he truely payed therefore. It was Replied, That the forefaid Comprising was Redeemable, notwithstanding that there was Ten Years elapsed fince the date of the Defenders Difbecause the Act of Parliament bears it to be Redeempolition; able within Ten Years after the appearand Heirs Acquisition, and the Acquilition behoved to be understood a habile Convoyance; so that if there was Infeftment upon the Comprising in the Author's person, the Right was not compleatly acquired till the appearand. Heir was Infeft upon his Author's Disposition, or if there was no Infestment upon the Comprising, then the Right was not fully established by the Disposition, until Intimation thereof, was made by Action for Mails and Duties, or fome other way, and that, if the Ten Years were compted from the date of a latent Disposition made to the appearand Heir, the intent of the Act of Parliament should be evacuated; feing the appearand Heir might continue the Father's Possession and conceal his Right to the Comprising until the Ten-Years were elapsed. The Lords found; That the Act of Parliament was to be understood, that the TenYears should Commence from the appea-

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randHeir's being Infest upon the Right of the Apprising if his Author was Infeft, or if there was no Infeftment upon the Comprising, from the time that the appearand Heirs Right thereto was made publick by Action for Mails and Duties, or fuch other publick Deed, whereby the Creditor might know that the appearand Heir did ascribe his Possession thereto. The rent of Kereditas jacong bolong to

Th'apparent Keir & LXVIII. 22 November 1683. Reduction of a Compryfing on Minority and Lesion.

Ackbrair of Netherwood having intented, against Sir Robert Crick and a month of the state of the ton and Romes his Assigneys, a Reduction of a De-& Rohrangare creet recovered against him, as lawfully charged to enter Heir to his Father, Grand-Father, and Grandsir, for certain Debts resting by each of them, as also, of the Apprysing following upon the said Decreet: The Reason of Reduction, was Minority and Lesion, in so far as might be extended to the Father, or Grand-Father's Debts, whom he noways represented: And that as to the Grandsir's Debts, he offered to prove payed, citation partly by Sir Robert and his Assigney's Intromission with the Mails and Jonepen Duties of the Lands' of Netherwood, (wherein his Grandfir died last Vest and Seafed,) before the deducing of the foresaid Comprysing of the saids Lands. It was alledged, That the Mailts and Duties, could not compense the Debts of the Grandsir, because they were in bonis of the Grand-Father and Father, who were appearand Heirs to the Grandfir, and not in hæreditate jacente, and that the Defender had Ground of Recompensation, upon Debts due by the Father and Grand-Father, which would elide and compense all the Maills and Duties intrometted with, and that by an Interlocutor in the same Cause, it was found, that the Maills and Duties uplifted, belonged to the Executors of the appearand Heir, and that they might be compensed. with his Debt. It was Duplyed for the Pursuer, That he opponed a Decreet recovered at his Instance, as Heir to his Grandsir, against Sir Robert for payment of the Maills and Duties, and that Recompensation was not receivable after Sentence. The Lords found, That altho the Maills and Duties were in bonis of the intermediat Heir, yet the Grandfir's Debt being stated against the last appearand Heir, by the foresaid Sentence recovered against Sir Robert, and the Comprysing subsisting in so far as concerned that Debt, they found, That the Maills and Duties ought to be prime los

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ro ascribed in satisfaction of the Debt due by the Grandsir, who died last insest in the Estate, it being fors durior, as being the Ground of an Apprysing, whereas the other due by the Grand-Father or Father were only personal Debts. It was surther alledged, That Sir Robert's Intromission, could not compense, to the prejudice of the Assigney, who had deduced the Apprysing, in regard Sir Robert's Intromission, was not liquidat by a Sentence at the time. It was Answered, That before Assignation, there was Process intented at the Pursuer's Instance, against Sir Robert for Maills and Duties, so that res fuit litigiosa, after which, Sir Robert could not assign his Debt, to the Pursuer's prejudice. The Lords sustained the Reply, and found, That it being res litigiosa, by a Citation at the Pursuer's Instance, whereupon followed the Decreet for Maills and Duties, that the Assignation after the Citation before the Sentence could not prejudge the Pursuer.

act. 9.10.1.1669.

a double litto LXIX. 29 November 1683. Interruption of Prescription.

N the Action pursued by Sir Patrick Home against Home of Linthil, craving, That it might be found and declared, that Sir Patrick, as being inseft in a Miln, had Right to affix his Damm upon the end of a Commonty, wherein Linthil had an Interest, upon this Ground, That he and his Predecessors had prescribed a Servitude, having been fourty years in Possession: And Linthil having alledged Interruption, for proving thereof, he produced a Summons of Molestation and Declarator, and raised at the Instance of Linthil's Author, in a Miln superior to Sir Pa-achin. trick's, for demolishing Sir Patrick's Miln, that it might not make the Water restagnat upon the superior Miln. It was objected by Sir Patrick, That this Interruption could not be fustained, it being only raised at the Instance of the Heretor of the superior Miln, as being insest therein, and in the Multures of certain Lands condescended upon in the Summons; and which Interruption could only import a Regulation of Sir Patrick's Damm, that it might not restagnat the Water upon the other Miln, but could not import an Interruption of Sir Patrick's Servitude, of affixing the end of his Damm upon the Commonty, there being no mention in that Summons of Interruption, that the Pursuer thereof was infest in the Commonty: And therefore, that he craved the Land-Stone of the Damm to be demolished, the Infestment of the Commonty being absolutly disparat Titles; so that the Interruption upon the one Title, could not be ascribed

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ascribed to the other. It was objected by Sir Patrick, 2do, That the Interruption was null, seing that all Interruptions, by the Act of Parliament 1669, that should be made use of in relation to Heretable Rights. should be renewed every seven years, and that this was not. It was Duplved for Lintbil, That the Interruption was sufficient, being the Pursuer therein, had Right both to the Commonty, and superior Miln, and had concluded a casting down of the said Miln Damm, and not a simple Rectification, and that there was no necessity, that all these Titles should be lybelled, to the effect, that the Summons might be sustained as an Interruption, feing his prefumed Acquiescence was taken off by executing of the Summons.' 2do, That there was no necessity to renew this Interruption within seven years, seing the Act of Parliament could be only extended ad futura, and that this Interruption was raised long before the Act of Parliament, whereby there was fus acquifitum to the Raifers thereof. The Lords found the old Summons did only import an Interruption. in order to the Regulation of Sir Patrick's Damm, that it might not cause the Water restagnat upon Lintbil's Damm, but that it did not import an absolute Interruption, in relation to the affixing of the Damm-Stone upon the Commonty: And also, The Lords found, That the Act of Parliament anent Interruptions, did only extend ad futura, and not to this Interruption that was raised before the Act. fee acts. 14.8, 19. Parl. 1605.

LXX. 30 November 1683. Inserter of Date and Witnesses.

Atson having charged Scot, for payment of a Sum of Money, contained in a Bond: And Scot having suspended upon this Reason, That the Bond was null, in regard it appeared by Ocular Inspection, That the Creditor's Name, Designation, Date, and inserting of the Witnesses was with an other hand then the Writer of the Body, and that the Inserter was not designed. And it being Answered, That the Charger offered to condescend upon the Inserter, who was one of the Co-Nottars Subscribers of the Bond. It was Answered, That by the late Act of Parliament 1681, Bonds are declared null, where the Writer is not designed: And by the said Act it is declared, That the said Nullity is not to be supplyed by condescending ex post saido. The Lords sustained the Bond, and sound, That the Act of Parliament extended to the Writer of the Bond, but noways to the Inserter of the Date and Witnesses, which they sound, might be supplyed by a Condescendence.

LXXI.

48 The Decisions of the Lords

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notpaying mail.

LXXL Eodem Die. A Back-Tack.

N the Action of Declarator pursued by Mr. John Burdon against Sir Andrew Dick, wherein Burdon concludes, that the Back-Tack, contained in the Contract of Wadset, granted by him to Sir Andrew, may be declared null, upon this Ground, That Sir Andrew had not made payment of the Back-Tack Duty, for three Terms. It was alledged by Sir Andrew, That this Declarator could not be sustained, there being no Irritancy in the Back-Tack, and that there was no Act of Parliament, as in the Case of Feu-Duties, irritating Back-Tacks. The Lords sustained the Declarator, and repelled the Desence; but allowed Sir Andrew to purge by payment, against Candlesmass next ensuing.

Court of a Bavony LXXII. Primo Decembris 1683. Spuilzie and Abstracted Multures.

Defender, That he could not be lyable for a Spuilzie, either of the made fear Miln the saids Corns, which was a part of the Thirle of his Miln:

And by a Statute of King William, and by several Acts in the Abbay Court of Melross, of whom this Miln was holden, it was declared, That it should be lawful, to sease upon the Corns Abstracted, or Horse. The Lords sustained the Desence as to the Sacks of Corn, and assoilzed the Desender from Restitution thereof: But as to the Horse, restricted the same to wrongous Intromission, and sound them only lyable for Restitution of the Price of the Horse.

Obtomortefortm of pay LXXIII. 20 December 1683. Heretable Bond.

R. William Gordon, as Assigney constitute by Andrew Balfour, Heir to Robert Balfour, in and to a Bond granted by Andrew Ker, to long Robert Balfour, (for Security of which Sum, Andrew was obliged to infell this Creditor, in an Annualrent forth of his Tenement in Edinburgh,) did intent Action, against the Heir of the said Andrew Ker, for payment. It was alledged, That this Sum was Moveable, the Creditor having died before the first Term's payment of the Annualrent, and that the Defunct, had assigned the same in savours of Andrew Melvil, to whom Ker

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was Creditor, and fo had Ground of Compensation. It was Answered for Mr. William Gordon, That this Bond was Heretable ab initio, seeing it bore an Obligement to infeft before the Term of payment, and confequently he, as Assigney from the Heir, was preferable to any Assignation made thereof on Death-Bed by the Defunct: And that albeit Bonds. which were only Heretable by a Destination for payment of Annualrent. were Moveable before the Term of payment, yet Bonds bearing an Obligement to infeft, were Heretable ab initio, as was clear by the Decision 15 July 1623, Anderson contra Anderson, and the Decision cited in January 1624, is only where the Bond bore an Obligement to make payment at a certain Term, and failzieing thereof, to infests in which Case, the Sum was found Moveable before the Term of payment only. The Lords preferred Mr. William Gordon, and found the Bond Heretable ab initio, altho before the Term of payment the Creditor cap. 39. Stat. 206. was deceast.

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LXXIV. Primo Januarii 1684. Women Witnesses in Adultery.

Here being a Bill of Advocation, given in by the Counters of Mons for contradictorin teith, again it the Earl of Monteith, in an Action of Divorce depen- women of exception ding against her, upon this Reason, That the Commissars did sustain the majorey. Adultery to be proven by Women Witnesses. It was alledged for the Countels, That by the Chap. 34. Statut. 2. Robert 1st. Women were excluded from being Witnesses: And by the Canon Law, C. Forum. 10. Decretal. Gregor. de Verborum Significatione, they were excluded, as being natura inhabiles. It was Answered for the Earl, That by the Civil Law, they were Witnesses, and, notwithstanding the Text in the Canon Law alledged, yet they were Witnesses babiles in Attrocious and Latent Crimes, such as Adultery, otherways that Crime should go unpunished, without any Legal Probation, Women being most conversant in Trocking about that Crime. It was Replyed, That not only was it the politive Law of the Nation, that Women should be excluded from being Witnesses, but likeways the uncontraverted Practique of the Nation: And in all the Divorces fince the Institution of the Commissars of Edinburgh, there was never a Woman adduced to be a Witness in a Divorce. It was Duplyed for the Earl of Monteith, That it ver be instanced, that in foro contradictorio, Women were rejected in the like Cases. The Lords remitted the Cause to the Commissars,

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and found, That Women, omni exceptione majores, might be received as Habile Witnesses, in respect of the Occultness of the Crime.

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LXXV. 2 January 1684. Adjudication.

Liquid fum! TN the Action of Maills and Duties, pursued by Mary Bruce against Sir Patrick Hepburn, wherein the craved, That the having adjudged, upon Contract of Marriage with John Mackpherson, the Sum of 8000 Merks, due by Sir Fames Keith, to Dougal Mackpherson Father to the said Fohn, in Liferent, and to the faid John in Fie, whereupon there was a Compryfing led, both at the Instance of the Liferenter, and Fiar of Sir Fames Keith's Estate: The Ground of her Adjudication, was an Obligement, in the faid Contract of Marriage by her Husband, whereby, he was obliged to imploy for her Liferent Use, the Sum of 15000 Merks upon Land or Annualrent, and also, to make payment thereof termly; in which Adjudication, the adjudges not only for bygones that were then due, but in time coming, the Terms being come and past, and for fulfilling other Obligements contained in the faid Contract. It was alledged for Sir Patrick Hepburn, That he having the first Adjudication for liquid Sums of Money, the being within Year and Day, could only come in pari passu with him, as to the bygones that were due the time of the Adjudication, but not as to what should be due thereafter, seing that was not liquidat, and an Adjudication was a Judicial Seal, and behoved to be for liquid Sums. It was Replyed for Mary Bruce, That the Contract did not only contain an Obligation to pay, but also an Obligation to imploy immediatly after the Marriage, and so she might adjudge this Sum that belonged to her Debitor, for a Security to her not only as to bygones, but in time coming during her Life, and that the Obligement was an Obligement ad faciendum, viz. To imploy: And the Husband not having voluntarily fulfilled his Obligement, this was the only Remedy the Wife had for her Security; and that it was denyed, that all Adjudications were for liquid Sums, as a Judicial Seal, seing in this Case it was only for a Security, and the Legal was never to expire during her Life. The Lords Sustained Mary Bruce her Adjudication, as a Security to her, not only for bygones, but in time coming during her Life, And ordained her to come in pari passu, with Sir Patrick, for both.

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LXXVI. 23 January 1684. Gift of Escleat.

Ornelius Neilson as Donator to the Escheat and Liferent of his Bro-ther Craigcassie, having intented an Action of special Declarator against Kennedy, for the Sum of 8000 Merks, due by the said Kennedy tos the Rebel, conform to the Rebels Contract of Marriage with Kennedy's of a per here. Daughter. It was alledged for the Defender, That there could be no Process at the Pursuers instance, for payment of this Sum, because the Pursuers Gift could only extend to what belonged to the Rebel the time of the Gift, or acquired by the Rebel within Year and Day thereafter But fo it is, That this Contract of Marriage, was long after Year and Day, and so behoved to fall under a second Gift. It was Replied for the Pursuer, That this Gift bore, all that was due to the Rebel the time of the Horning, or that he should acquire, at any time thereafter during his 2 do. That this Alledgance was not Competent to the Debitor, but to a second Donator. The Lords Repelled the first part of the Reply, and found it only Stile, that notwithstanding thereof the Gift ought to be restricted to what was due to the Rebel the time of the Gift, and within Year and Day thereafter; and found this Alledgance not only Competent to the second Donator, but also to the Debitor being exclusive of the Pursuers Title. D. cxm.

LXXVII. Primo Februarii 1684. Reduction, Inhibition, Adjudication.

IN the Action for making, Arrested Goods forthcoming, pursued by John Anderson against William Anderson's Tenents, and the said William for his Interest. It was alledged for one Crichton and other Arresters, That he ought to be preserved, because his Arrestment was prior to John Andersons. It was Answer'd for John Anderson, That he ought to be preserved, because his Arrestment was sounded upon a Dett due by George Anderson, Son to the said William, and that the said William, was denuded by Disposition of the Tenement, whereof the Mails and Duties was now in Contraversie, and that Crichtons Arrestment was sounded upon a Debt of William the Father, who had no Right to the Tenement, or Mails and Duties thereof. It was Answered for Crichton, That he being anterior Creditor to the Father, had raised Reduction of the Son's Right to the Tenement ex capite Inhibitionis; and upon the Act of Parliamen

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Cause, and that he held the Production satisfied, and repeated his Reason, ex capite Inhibitionis, against the Son's Right, which being reduced, the Arrestment for the Son's Debt fell in Consequence, and that the Maill's and Duties being un-uplisted, and in the Tennents hands, ought to be decerned and made forthcoming to the said Crichton. It was Duply d, That, althouthe Son's Disposition were reduced instantly, yet it could only take effect from the Date of the Decreet; so that the Creditor of the Son, who had Arrested, ought to be preferred to the Maills and Duties that were due before the Decreet of Reduction. The Lords found, That the Decreet of Reduction, did only take effect from the present Date thereof, and preserved the Arrester upon the Son's Debt, to the Maills and Duties, due before the Decreet of Reduction, albeit they were extant in the Tennents hands un-uplisted.

Thereafter it was alledged, That the Inhibition was null, in respect the Execution thereof did bear, that the same was execute at the common Debitor's Shop, by delivering a Copy to his Wise there, whereas all Executions ought to be Personally, or at the Dwelling-House. The Lords sustained the Objection against the Inhibition, unless the Inhibiter would offer to prove, that the Shop was a part of the Dwelling-House.

Thereafter it was alledged for Anderson the Arrester, That he had obtained a Decreet of Adjudication of the Tenement, whereof the Maills and Duties were craved; and therefore, ought to be preserved, not only since the Decreet of Adjudication, but since the Citation, which was the Ground of the Adjudication, in regard the Act of Parliament declares a Citation upon a Summons of Adjudication, to be equivalent to a Comprysing, and Inseltment following thereupon: And true it is, That a Comprysing and Inseltment thereupon, would be preserable to Crichton's Arrestment. The Lords preserved the Adjudger, only since the Decreet of Adjudication: And found, That the Act of Parliament, declaring Citations of Adjudications to be equivalent to a Comprysing and Insestment, was only in a Competition with voluntar Rights, but did not prejudge Legal Diligences, such as Arrestment.

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Edital citan at mercarcio fedim. LXXVIII. Eodem Die. Interruption of Prescription.

Rown of Coalstoun being a Creditor to Archibald Hamilton, and acossoritation having served Inhibition, he intented, against Hepburn of marning to remove Beirfoord, a Reduction, ex capite Inhibitionis, of a Disposition of the Lands

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Lands of Monkrig, granted by his Debitor to Beirford's Grand-Father. It was alledged for Beirford, That the Inhibition was prescrived, there being no Document taken thereupon within fourty years. It was Replyed, That the Prescription was interrupted by a Reduction, raised at Coalstour's Instance against Beirford in anno 1635, and also, by an Exhibition raised and execute against Beirford in anno 1637: And, 3tio, By several Warnings to remove used at his Instance, which he offered to prove by Witnesses. It was Duplyed for Beirford, That the Reduction raised in anno 1635, could not be sustained as an Interruption of the Prescription of the Inhibition, because there was no Execution against the Party perfonally, or at his Dwelling-House, but the Execution was against him. and his Tutors and Curators, allennarly at the Mercat-Cross of Edinburgh. It was alledged for Coalstoun, That quævis Insinuatio was sufficient to interrupt the Prescription, and that this Citation being at the Mercat-Cross of Edinburgh, where the Curators dwelt, was a sufficient Certioration: And Interruptions were sustained in many Cases, where a Decreet could not follow, as in a Process of Poynding the Ground against Tennents, albeit the Master was not called. The Lords found, That the Reduction foresaid, was not a sufficient Ground of Interruption of the Prescription of the Inhibition. To the Second, it was Answered for Beirford, That the Exhibition could not be sustained as an Interruption. because the same was at the Instance of Coalstown, against Beirford and several others, wherein he lybels, that there was a Contract betwixt Beirford and his Debitor Hamilton, anent the Alienation of the Lands of Munkrig, wherein Beirford was obliged to pay 1000 Pounds, due by Hamilton to Coalstoun, and thereon concludes Exhibition of the Contract. wherein, there is not the least mention of the Inhibition; so that Beirford being secured, in relation to the Ground lybelled, he was not any ways certiorat, in relation to the Inhibition: And albeit this Process of Exhibition may be sustained, as an Interruption for the Debt, yet it cannot be fultained, as an interruption for the Inhibition, it being very confishent, that the Inhibition may prescrive, be discharged, and renunced, and vet the Ground thereof may subsist. It was Answered for Coalstown, That accessorium sequitur principale, and whatever did interrupt the Prescription of the Ground of the Inhibition, did interrupt the Inhibition it felf. Lords found, That the Exhibition foresaid, did not interrupt the Prescription of the Inhibition; as also, they refused to sustain the Warnings to be proven by Witnesses, as Grounds of Interruption. LXIX.

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LXXIX. 12 February 1684. Subscribing Witness.

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I form fall Llan, having purfued Blair, Minister at as he who had fubscribed Witness to a Bond granted by to the faid Allan: And there being Improbation of the said Bond, raised at the Instance of the Heir of the Granter, Blair being examined, and having deponed, That albeit he was a subscribing Witness in the Bond, yet he did not fee the Granter subscribe the same; upon whose Deposition, the Bond being declared null, and to make no Faith, the faid Allan intented Action against Blair, for Damnage and Interest, as he who had subscribed himself Witness to the Bond, and yet depones, that he was not Witness, whereas, if he had not subscribed Witness, the said Allan would have caused the Granter subscribe a legal Bond before Witnesses. It was alledged for Blair the Defender, That there was no Law for making him lyable for Damnage, seing it was frequent and ordinary, to subscribe Witness, albeit they did not see the Party subscribe: And if this Action were fustained, it would preclude from all Improbation, seing the Witnesses subscribing behoved either to bide-by, or be lyable for Damnage and Interest. It was Replyed for the Pursuen That the subscribing Witness to a Deed, that he did not see sign'd by the Partie, was species falfr, and that such Witnesses might cheat and circumveen the most Provident Men, who could not but rest satisfied with the Legality of their Writs, when they faw them fign'd by famous Witnesses, whose Hand Writing they knew, and yet these Witnesses, might evacuat the Deed, by deponing, they did not see the Party subscribe. The Lords sustained the Action of Damnage against Blair the subscribing Witness, by whose Deposition, the Bond was declared to make no Faith.

hout designing it. LXXX. Eodem Die. Execution of Letters of Horning.

of Buchtrig Advocat, as Donator to the Escheat and Liserent of Crichton of Castlemains. It was alledged for Mr. James Nasmith, John Riddoch, and several others, Creditors of Castlemains, That the Horning was null, in regard the Charge did bear, that the same was given at his Dwelling-House, and did not design the place. It was Answered, That this being a third Gift, the Horning was twice declared in the two for-

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mer Gifts against the Rebel; so that the Rebel could object nothing against it: And if the Rebel could object nothing, no more could any of his Creditors, fince the Rebellion, or who had any voluntar Rights derived from him fince the Declarator, and that there was no Act of Parliament, nor Instruction given to the Messenger, appointing Executions of Charges of Horning, to bear the particular Designation of the Dwelling-House: Likeas, by a Decision in anno 1632, betwixt Montgomery and Fergusbill, The Lords sustained the Horning, albeit the dwelling House was not particularly designed, the Rebels Stile and dwelling House being all one; and fo it was prefumed, that the dwelling & place of Designation was the same. It was answered for the Defenders, That the Designation of a dwelling House, was absolutly necessar, or otherways it were impossible to improve an Execution: Likeas, in Anno 1626. There was an express Decision, annulling an Horning used against a Burges in Air, in respect his dwelling House was not particularly designed, and by warrand of the Lords, the Register having then search'd whether it was usual in Executions of Hornings to design the dwelling House; he made Report that there were in the Records several Hornings about that time, in which the dwelling House The Lords found it Relevant to sustain the Horning, was not designed. that Castlemains dwelling House was called Castlemains, and that being proven, it was prefumable he was charged thereat, according to the foresaid Practique 1632. Comission for caus on crony ,

LXXXI. Eodem die. An Delegatus potest Delegare?

N an Action of Declarator, pursued by John Wedderburn Clerk of the Bills, against Mr. Henry Oliphant, who had received from Sir William Bruce, formerly principal Clerk of the Bills, a Commission for being Deput, in loosing of Arrestments and Caution in Laborrous during his Life, wherein he craved, that it might be found and declared, That Sir William, his Gift, not bearing a power to Substitute, he could grant in O Gift to Mr. Henry Oliphant, but during Sir William's Incumbencie. And it being alledged for Mr. Henry, That he having his Gift for Onerous Causes from Sir William Bruce, Sir William could not prejudge him, by his voluntar Dimission of the said Office, in savours of Sir James Anstruther, by whose Death the Office is come to this Clerk. 2do. That albeit regulariter Delegatus non potest Delegare, yet where there has been a Custom otherways, it does not hold; and it was offered to be proven, that the Clerk of the

the Bills from time to time, both before and since Sir William Bruce his time, has been in use constantly to grant Gifts of this Tenor. The Lords found the first Desence Relevant, viz. That Sir William Bruce having voluntarly dimitted, by which Dimission, the Right of this Office as Clerk to the Bills, came to this Clerk, that the Dimission could not prejudge Mr. Henry Oliphant, but that he ought to brook the Office during Sir William's Life, and therefore Associated Mr. Henry from the Declarator.

LXXXII. 15 February 1684. Conjunct Fiar.

N the Action of Reduction, pursued at the instance of the Lord Pitslige and Robert Milne his Alligney, of a Comprising deduced at the in-Stance of Hobel Hilltone and Mr. William Hog her Husband for his interest, of the Estate of Ludguhairn, upon this Reason, That the Comprising was null, being led upon a Bond granted by Ludquhairn to Patrick Hodge and the said Isobel Hilston then his Spouse, in Conjunct-fie, and the Heirs to be procreat betwixt them: In which Bond the said Isobel Hilston was only Liferentrix, and so could not Comprise for the Fie of the Sum. And 2do. That albeit she, and her second Husband Mr. William Hog, could have Comprised for the Sum, yet she behoved to Comprise in the Terms of the Bond, to wit, in favours of the Heirs of the Marriage betwixt her and Patrick Hodge, but could not Comprise for her felf and her second Husband. It was answered, That she was Conjunct Fiar by the Bond, and fo had power to suit Execution, and had jus exigendi; and albeit the Comprising was not in the Terms of the Bond, yet the Bond did regulat the Comprising, and the Apprising did accress to the Heirs of the first Marriage, mentioned in the Bond: Likeas, the Defender had Right from Mary HodgeHeir of the first Marriage, and also my Lord Hercarse was Heir of the second Marriage, betwixt Isobel Hilston and Mr. William Hog, who compeared and concurred in this Process. The Lords found, That Ilobel Hillton being Conjunct Fiar, had jus exigendi, and therefore might warrantably lead the Comprising, and the Comprising, being led by her and her second Husband, did accress to the Heir of the first Marriage, mentioned in the Bond, and therefore sustained the Comprising against my Lord Pitsligo, albeit a singular Successor likeways in the saids Lands. D. Ci.

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LXXXIII. Eodem Die. Poinding of Pleugh Goods.

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Tems having Suspended a Debt resting by him to Goodsire. upon a Reason of Compensation sounded upon a Decreet of Spulzie recovered at Weems's instance, against the said Goodfire, which Decreet of Spulzie was recovered upon this Ground, That the Pleugh Goods were poinded in labouring time, when there were, upon the Ground, Corns and other Goods, which might have been pointed to the value of the Debt. It was Replyed, That Weems, at whose instance the Decreet of Spuilzie was recovered, being Sub-tacksman to Goodhre the Charger, who was principal Tacksman of the Land, and having poinded the Pleugh Goods for a personal Debt, he had, for the Ground Dutie or Rent, an Hypotheque in the Corns and other Goods belonging to the Sub-Tacksman; so that unless it were Alledged, and could be Proven. That befide the labouring Goods, there were upon the Ground Corns, and other Moveables sufficient to have satisfied both the Tack-Duty and also the personal Debt, (the ground of the Poinding) no Spuilzie could be sustained. The Lords found, That the Spuilzie could not be fustained, except it were Alledged and Proven, that by and attour the Pleugh Goods, there was upon the Lands the time of the Poinding, other Goods which were sufficient to pay both the Tack-Duty and personal Debt contain'd in the Letters of Poinding, and therefore reduced the Decreet of Spuilzie.

LXXXIV. 16 February 1684.
All of Parliament anent Debitor and Creditor.

IN the Action of Removing, pursued at the instance of William Wilson Merchant in Edinburgh, against Sir Alexander Home. It was alledged for Sir Alexander, That the Pursuer being a Compriser, or Adjudger of Sir Alexander's Estate, and the Legal not being expired, could not pursue him to Remove from his House and Parks of Rentoun, in regard, by a Clause in the Act of Parliament 1661, anent Debitor and Creditor, it is expressly provided, That the Lords of Session, upon Supplication made by the Debitor before the Legal be expired, may restrict the Creditor to possess such Lands as they think sit, the yearly Rent not being under the Annualrent of the Sums contained in the Apprisings or Adjudications:

Likeas, the Lords of Session, by a Decision, 27 June 1662, betwixt Wilson and Sir William Murray of Newtoun, found, That Wilson might be restricted, during the running of the Legal of his Apprysing, to a parcel of the Estate, and appointed the Creditor to make choise thereof, (excepting the House and Mains) And that, if the Rent thereof should be above the Annualrent and Publick Burdens, he was to be comptable for what was over and above. It was Replied for the Pursuer, That that Clause was Temporary, and did only extend to the Prorogations of Compryfings, the Legal whereof being expired, was prorogat by that Act, viz. Comprylings deduced after 1652, whereof the Legal was expired before the Act, but does not extend to Comprylings deduced after the date of the Act, fuch as the Pursuer's Adjudication is; and at the time of the foresaid Decision, which was in anno 1662, the years of the Proroga-hat tion of the Legal of the Apprying therein-mentioned was not expired. The Lords found, That the Clause of the Act of Parliament was not Temporary, but was a perpetual Law, and did Regulat Comprysings, as well deduced after the Act, as before: And therefore found, That they had power to restrict the Pursuer's Adjudication, and ordained him to choise the Lands he desired to possess, except the House and Mains.

Adjudication.

It was alledged, 2 do, for the Defender, That this Adjudication was fact mult, being a General Adjudication of the whole Estate, for Principal, Annualrent and Penalty, and a fifth part more; whereas, by the late Armulan Jarroy Act anent Adjudications, the fifth part more was only allowed, where rectifying the Adjudication was particular of a certain parcel of the Estate effeiring to the Sum; but where it was general, it came in place of a Comprysing, and so the Decreet could have been extracted for no more, but Principal, Annualrent and Penalty. The Lord's found, That the Adjudication being general, was unwarrantable as to a fifth part more: And therefore, restricted the same to the Principal, Annualrent and Penalty, but did not annul the same simply, it being deduced before the Lords gave Instruction to the Clerks for Rectification of that Abuse: But they appointed an Act of Sederunt to be made and printed, discharging Adjudications of this Nature, to be for a fifth part more: And declared, if any fhould be, they would find them null, accordingly there is an Act of Sederunt framed to this purpose, and dated the 26 of February 1684.

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LXXXV. 25 February 1684. Reprobatour. Probat for seguel.

In the Action of Reprobatour, pursued by Newtoun of that Ilk, against of Mr. John Pope, for Reprobating of some Witnesses, that had deponed in a Process pursued at Mr. John Pope's Instance against him. It was alledged for Mr. John Pope, That there could be no Reprobator sustained, because the time when the Witnesses were received, the same was not Protested for, albeit there was Compearance, both the time when the Witnesses were received, and Interrogators given in for Newtoun. It was Replyed, That Newtoun was Minor, and so ought to be reponed against his Tutor's Omission. It being Duplyed, That altho Minors may be reponed, in relation to the Omission of any relevant Desence, yet, as to Judicial Proceedings, they were in the same Case as Majors. The Lords found, That the Reprobator, not being Protested for, could not be sustained, and that Newtoun, albeit Minor, could not be reponed against the Omission thereos.

LXXXVI. Eodem Die. Exhibition ad deliberandum.

In the Action of Exhibition ad deliberandum, pursued at the Instance of Scot against Forrest. It being alledged for the Desender, That the Pursuer, being only Heir of Provision, could not pursue an Exhibition ad deliberandum, it being only competent to the apparent Heir of Line. The Lords sustained Process at the Pursuer's Instance, albeit Heir of Provision.

LXXXVII. 27 February 1684. Action for Omissions by a Tutor.

In the Action of Reduction, pursued by Dunlap Younger, and his Lady Antonia Brown, of a Discharge, granted to Andrew Lundie by the said Dunlap, of his Omissions, as Tutor to the said Antonia. The how Lords found, That Wishaw, having Comprysed from John Brown, as lawfully charged to enter Heir to Sir John, had good Interest to alledge, That Lundie's Comprysing was extinct by Omissions, as Tutor to John Brown; and that by the Decreet obtained against John, as lawfully charged to en-cycles for only ter Heir to Sir John Brown, the Debt became John's Debt, and he be-

came personally lyable therefore, and so Wishaw might propone Compensation upon the Omissions which were due by the Tutor to the Pupil: But the Lords found, That Wishaw having Comprised or Adjudged from Antonia Brown as Heir to her Father Sir John Brown (after the death of the faid John Brown her Brother) and fhe having reduced the Service upon Minority and Lesion, whereby the Comprising was of the Nature of Adjudications upon a Decreet cognitionis causa, and therefore Wishaw could not compense the Sums contained in the Tutors Comprising by the Tutors Omissions, during the time of Antonia's Tutory, in regard, they found the Priviledge of making the Tutor lyable for these Omissions, personal to the Pupil, and to her Assignys, and so sustained the Discharge And found, That the Adgranted by Dunlap of the faid Omissions: judgers could not quarrel the famen.

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a tops powerhoed N the Action pursued by the Arch-Bishop of St. Andrews, against Bethun of Blebo, for reducing a Charter granted by Bishop Sharp, Receiving canon whereby the Lands of Blebo holding Waird of the Sea of St. Andrews, were Changed from Waird to Taxt-Waird, upon this Ground, That the add impedibilib Granter could not prejudge his Successors by Taxing the Waird and Marnonriage, which were Casualities. And it being alledged, That albeit there were several Laws limiting the Bishop's Power as to the Spirituality, viz. act 71. P.1457. The Teinds, yet there was no Law limiting the Bishop as to the Feuing backgi P.1503 and Taxing of the Temporality, except only, that the samen could not be done in Diminution of the Rental; and that both by the Common Law, and by the Act of Parliament K. Ja. 2. And by the Act made K: Ja: 4: Prelats and Barrons might fet their Lands in Feu-Farm, to the competent avail, i. e. not under the retoured Duty. And it being Replied, That the 100 m 6.061. on Bishops being Administrators of the See, could do no voluntar Act to the the act. 71. prejudice of their Successors; and that Taxing was a greater prejudice to their Successors then Feuing, seing the Tax-duty was only payable fe contigerit, and was a Limitation and Restriction of what the Bishop might have by the Waird and Marriage, whereas Feu-duty was a constant Rent yearly; and that there was no Law allowing the Bishop to Tax, but on the contrair by the 11. Ad Par: 10. Ja.6: Bilhops were appointed to leave their lene ices in as good Condition as they found them: Likeas, by the Act 5.

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Par. 22. Bishops are discharged to set their Quotts and Casualities: And by the 9.Ast.23.Par. There is a License to Bishops, to Feu out their Lands of P. 1621. for the space of three years allennarly, whereby it was clear, That Bishops could neither Tax nor 1 eu, till these three years were expired. The Lords sustained the Reasons of Reduction, and found, That Bishops could not Tax the Waird Holding, to the prejudice of their Successors, and to the prejudice of the King, when the See should vaick.

Thereafter it being alledged, That the Bishop had Homologat the fore-said Charter, by receiving the Canona, which was payed yearly by the old Charter, and was augmented by the new. The Lords found, That the Bishop was not precluded thereby, from pursuing a Reduction, seeing, while it stood, he could claim no more but the Canon, and therefore, found it no Homologation.

LXXXIX. 9 March 1684. Heir of Provision.

Y Contract of Marriage, betwixt Duncan Menzies of Nether-Urquhart, Peacock his fecond Spouse, the said Menzier as Prinand Menzies as Cautioner for him, is obliged, in the hand of hard cipal, and faid Contract of Marriage, to imploy 1100 Merks to himself and histain hime for Spouse, and the Heirs to be procreat betwixt them, which failzieing, to deniance of a the Husband's Heirs: Henry Bouffie having adjudged, the torefaid Obligement in the Contract of Marriage, from Menzies Son procreat of the faid Marriage, and thereupon, having intented Action against Menziestle Cautioner, for Implement of the Contract to him, as having Right from the appearand Heir of the Marriage. It was alledged for the Defender, That this was only a Destination, in so far as concerned the Heir of and that the Pursuer, could be in no better Case than the Marriage, his Cedent: But ita est, the Cedent behoved to be served Heir of the Marriage, and fo to represent his Father the principal Debitor, and confequently become lyable to relieve the Defender. It was Answered, That tho the Pursuer's Cedent was served Heir of Provision, and so did reprefent his Father as such, as to any other extrinsick Obligement, yet as to the Obligement, which was conceived in favours of the Pursuer's Author. as Heir of Provision, he could not be lyable to relieve his Father's Cautioners, otherways Obligements of this nature in Contracts of Marriage should be absolutly evacuat. The Lords decerned against the Defender for Implement, but superceded Extract till the first of January next, betwixt

and which time, the Defender might do Diligence for his Relief, by difcusting the Heir of Line, and declared, that after the discussing the Heir of Line, the Pursuer's Cedent should be lyable for relieving the Desender.

XC. Eodem Die. Juri diction of the Justiciary.

Wass. CTrachan of Glenkindie having pursued a Reduction of an Act of Adjour. nal, declaring, That he had Forfeit his Bond of 20000 Merks, which ach daison he had given for presenting of two Witnesses, before the Justiciary, against himself, he being pursued for a Murder. The Reasons of Reduction were as follows, 1mo, That the Justiciary had done wrong, in extorting the faid Bond from him metu carceris, contrary to the common Principle of Law, by which no Defender is obliged to furnish Probation against him-2do, That the foresaid Bond was fulfilled, in so far as, he not being able to keep the precise day, by reason of Storm of Weather, he presented the whole Witnesses, the next Court day. It was answered, That the Justiciary was a Soveraign Court, and the Acts or Decreets of the Commisfioners of Justiciary, could not be quarrelled before the Lords of Session. 2do, That the Crime for which the Pursuer was accused being Murder. and there being great Evidence thereof, by Depositions of Witnesses before the Justiciary, they might very legally commit him to prison, and he, for shunning the Imprisonment, granted this Bond: And it was most just in it self, seing he had withdrawn the material Witnesses, and kept them up in close Cellars for several days, and thereafter sent them off the Countrey, and the Bond was Forfeited, upon the account of not presenting of the Persons, who were material Witnesses. The Lords found the Justiciary was a Soveraign Court, and therefore refused to cognosce upon the Reasons of Reduction.

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XCI. Eodem Die. Tutor.

ability duly. IN the Action pursued by Mr. Lockhart, against Mr. John Ellies Elder of Elliestoun, wherein he craved, That Mr. John Ellies, being found by Sond Como the Lords to be Tutor to him, might Compt, for the Annualrent of the An-Low is below nualrent of the Pupil's Means, fince the Expiration of the Tutory. Mr. John Ellies having alledged, That Annualrent of Annualrent was reprobat Subor Intromotion Law. 2do, That if any was lyable, it was the Intrometting Tutor, Indinhametriz. my Lord Lee. And, 3tio, That he could not be made lyable for egable in folis?

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the Annualrents during the Tutorie, because the Defunct John Lockhart granted a Disposition to my Lord Lee, for the use and behoof of certain Persons, to whom he appointed several Sums to be payed, and the saids Legatars were found lyable for the principal Sum, but Assoilzied from the Annualrent, as being bona fide preceptum, the Disposition of Trust being reduced upon the head of Death bed. And it being Replied, That by the common Law, Tutors were obliged to imploy their Pupils Money upon Land, which was better than Annualrent. 2do. That there was in our Law no order of Discussing or Distinction betwixt intrometting Tutors and other Tutors, but all were in folidum lyable to the Pupil. Mr. John Ellis was in dolo, he having contraveened John Lackharts Disposition of Trust to my Lord Lee, and having advised, and obtained a Decreet of Declarator, finding the foresaid Disposition to have been granted when he was in leige pouste, albeit he was truly upon Death bed, and did confift with Mr. John's Knowledge. The Lords found Mr. John lyable in solidum for the Annualrents of the Annualrent, which were due the time of the Expiration of the Tutorie : And found, That he ought to have cleared Compts with the Curators, and Stocked the Annualrents that were due to the Pupil at that time: And found, That he was not lyable to Stock any Annualrents, during the Currency of the Tutorie. master & Srenhing.

XCII. 7 November 1684. Domestick Theft.

Andrew Forrester Bow maker, having pursued Merstoun, and Ker, as Cautioners in an Indentor for Merstoun Prentice to the said Andrew, for Damage sustained by him; The said Prentice having Imbazled his Bows and other Goods, and disposed on them without his Masters knowledge, and the Lybel being admitted to Probation, the Pursuer proved that the Boy did Steal several particulars, viz. Bows, Guns, &c. And also did prove several extrinsick Thests from other Persons, and he craved, That he might have juramentum in litem, as to the Quantities and Prices, in regard, it being a Domestick Thest, it was impossible for him, to prove all the particulars otherways than by his own Oath. The Lords sinding there was a Tract of Theiving, and Imbazeling of his Master's Goods by the Prentice, proven, they allowed Forrester the Master, to condescend upon the particular Species, Quantities, and Prices, and to give his Cathain litem, reserving to the Lords Modification after his Deposition. 2.177.

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XCIII. 7 November 1684. Continuation of Summons.

instance their shet R. John Belshes of Tosts, having pursued a Declarator against the Earl of Loudon and his Trusties, for Extinction of an Apprising deduced the year wall at the instance of Mr. John Living ston, of the Estate of Loudon, whereto the faid Trusties had Right. It was alledged for the Defenders, That there could be no Process upon the Summons, because the samen was continued several Years after the Days of the first Summons were elapsed, and that after Year and Day the Instance perished, and the Summons could not be continued. It was answered, That the Continuation was equivalent to 2 Wakening. It was Replied, That the Stile of all Summons, was to Compear the day of next to come, which imported the day of Compearance behoved to be within the Year, and confequently the Continuation. The Lords found no Process upon the said Summons, the famen not being continued within the Year after the Days of Compearance, in which case, they found the Instance perished, and so could not be Wakened. This is converted, & all marking of continued n by phos absorgated by ad of 5th.

> XCIV. Eodem Die. Clause of Conquest in a Contract of Marriage.

duving lib Lexander Anderson, being obliged by Contract of Marriage with Beavarional nest trix Dyet, to secure all the Conquest he should purchase during the time of the Marriage to himself and his Wife, the longest liver of them Cohon de methatwo, and to the Bairns to be procreat betwixt them: Wich failzieing to the faid Alexander his Heirs and Assigneys. The faid Beatrix Dyet Alexander's Wife being deceast, his Daughter, and only Child of the Marriage, is Married to one Simfon, and in her Contract of Marriage, the Father Contracts 3000 Merks of Tocher, but the faid Contract bears not that it was in Satisfaction of all the could Crave: The faid Daughter, and Simfon her Husband, having intented Process against the said Alexander Anderson. the Father, to make payment to her of the Conquest in her Mother's time, extending to 20000 Merks, at least to imploy the samen to be made Forth-coming after his Death. It was alledged for the Defender, That by Conception of the Contract, the Father remained still Fiar, and consequently might dispone upon the Conquest as he thought fit, and that the foresaid Clause, was a Destination allennerly, and so could take no Effect.

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The Lords found, That there could be no Process for the Implement of the Clause, until the Fathers Death, and that notwithstanding thereof, the Father might dispose upon the Conquest for any Rational or Necessary use, and that it might be affected with his Debts, Contracted, or to be Contracted at any time during his Life, and might be imploy'd for any other Rational or Necessary use.

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XCV. 16 December 1684. Arrestment.

N the Competition betwixt the Countels of Weems, and McKenzie of Aplecorfs, anent a Sum of Money lent to the Laird of May, by the Date of Tutor of Lovat and his Lady. It was alledged, That the Action for making Arrested Goods forthcoming at the Lady Weems's instance, was prescriv'd, in regard, by the late Act of Parliament, Actions for making Arrested Goods forthcoming, prescrive within 10 Years, except they be Wakened every five year; And that the Countels of Weems Arrestment, was not Wakened within five Years after the Act of Parliament. answered for the Countess, That her Action for making Arrested Goods forthcoming, was depending before the Act of Parliament; and the Act could not be extended quoad præterita, except it had born an express Clause 2do. That by the Act of Parliament, Actions prescrive for that effect. in Ten Years, and that this Arrestment was Wakend within the 10 Years; And the meaning of the Act of Parliament was, That the Wakening behoved to be within the 10 Years, and after the Wakening there behoved to be every five Years a new Wakening. It was Replied for Aplecorfs, That the Act of Parliament having declared and ordained, that Arrestments, even before the Act, should prescrive within five Years after the Act, Actions for making Arrested Goods forthcoming being but a consequence of the Arrestment, the Act of Parliament must be extended to such Actions as were depending before the Act. The Lords did not decide the first point, whether the Act of Parliament did extend to Actions for making Arrested Goods forthcoming, depending before the Act. But they found, That this Action being interrupted by a Wakening within the 10 Years, did not prescrive: And as to the provision of the Act of Parliament, That it should be wakened every five The Lords were of Opinion, That the meaning of the Act of Parliament was, That Actions for making arrefted Goods forthcoming. should be wakened within 10 Tears after the raising of the Action, if the Action

Action was raised since the Act of Parliament, and within ten Tears after the Act of Parliament, if the Action was depending before the Act, as was in this case, and that the Action behoved to be wakened every five years commencing from the date of the wakening, and not from the date of the raising of the Process.

XCVI. 23 December 1684. Causa Data & non Sequuta

He Earl of Lauderdale, and my Lord Maitland, having granted a Ratification, to my Lord Huntingtour, of a Disposition made by the Duke of Lauderdale, to my Lord Huntingtour, for the behoof of the Dutches, of the Lands of Leidingtoun, and others. In which Ratification there was a Clause, wherein the said Earl of Lauderdale and Lord Maitland were obliged to purge all Incumberances that might affect the Lands, and particularly Comprisings. Upon this Ratification, the Earl of Lauderdale and Lord Maitland being Charged, they Suspended, and raised Reduction, the Reason whereof was, That this was a conditional Write, in case they should succeed to the Lands Tailzied to them by the Duke, which, albeit not Hypothecally conceived, yet the Condition was implyed, in fo far as the faid Ratification bore in the Narrative. Forasmuchas, The faid Duke had granted a Tailzie to the Early in Liferent, and to the Lord Maitland in Fie, and that it was Just and Rational that the Lady should be secured; It did necessarly imply, That if either the Duke should have Heirs of his own Body, or that if the Duke conform to the Power referved to him, should alter the same, it were neither Just nor Rational that they should be lyable to warrand the Lands to the Dutchess; and albeit, that neither of these two have fallen out, yet the equivalent has, which is, That there is an expired Appriling against the Duke of Lauder dale, the time of the Tailzie, whereby they were secluded; So that they neither did, nor could enter Heirs of Tailzie to the Duke, in the saids Lands. It was answered, That they opponed theRatification, which, whatever the Narrative was, yet the Obligatory part was Pure and Simple, and wherein, particularly Comprisings are enumerated, and that a falle or wrong Narrative did not derogat from the Obligatory part, and that the Narrative, even as it was conceived, bore, That the Duke had granted a Bond of Tailzie, which was true. It was Replied for the Suspenders, That it did appear by the Write it felf, That the true Cause of the granting thereof was, in Contemplation of the:

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the Succession to the Tailzied Lands by the Tailzie; So that by the Comprising, the Tailzied Lands being carried away, the Obligatory part of the Ratification ought to be declared Null, being causa data in the Ratification ought to be declared Null, being causa data in the Comprisings, was clear to be in relation to the Lands disponed; So that the Lands Tailzied, being carried away by an expired Comprising, they could not be obliged to purge the Lands disponed of Comprisings affecting the samen. The Lords found, That the Cause of the Ratification being the Tailzie, and by vertue thereof, the Succession in the Lands Tailzied, That if there was an express Apprising of the Lands Tailzied standing against the Duke, by which the Tailzied Estate was carried away, so that they could not succed thereto, that the Letters ought to be Suspended as to the Obligatory part of the Ratification, The Ratification being Causa data & nonsequence.

XCVII. 10 February 1685. Clause of Substitution in a Bond. carys noted

Here being a Bond granted by Scot of Langhame of 2000 Merks, n. bearing the Receipt of Money from Mortimer, Relict of Bailie Calderwood, and payable to the said Mortimer, for her Liferent Calderwood her Son in Fie, with this Provision. That in case the Son should die without Heirs of his Body, the Sum Mortimer his Mother and her Heirs: The should return to Son before his decease, upon Death-bed, assigns to the Colledge of Edinburgh the faid Sum, and he Died without Heirs of his Body: The Colledge having purfued the Debitor, for payment of this Sum contained in the Bond: There is compearance for one Wilson, Executrix to the said Mortimer the Mother; And alledged. That the ought to be preferred, in regard, by the Tenor of the Bond it appeared, that the Money was received from her Mother, and albeit her Brother was Fiar, yet the Fie was qualified with the foresaid Provision, That failzieing of Heirs of his Body, the Sum should return to bis Mother; which Provision, he could not evacuat, by the forefaid Mortification, which was a voluntar Deed, without an Onerous Cause. The Lords having examined Witnesses ex officio, if the Money was Originally the Son's, and not the Mother's; and that not being proven by the Depositions of the Witnesses, but the contrair, That the Money belonged to the Mother. They found, That the foresaid Provision was not

Grace disposition

Bankrupt.

of the Nature of a simple Substitution, but was of the Nature of a Provifion or Condition, and so could not be frustrat by any voluntar Deed, without an Onerous or necessary Cause, and therefore preferred the Executors of the Mother to the Colledge.

Eodem Die. Disposition Omnium Bonorum.

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creticompeling. Pan paling and Drummond as vitious Intormette pursues Watson and Drummond as vitious Intormettors with her Debitor's Goods and Gear, for payment of her Debt. In this Process, It was alledged, That he could not be lyable as vitious Intromettor, because any Intromission he had, was by vertue of a Disposition from the common Debitor, for payment of the Debts resting to him. It was answered, That notwithstanding of the Disposition, the Pursuer ought to come in pari passu with the Defend as to the Goods contained in the Disposition, effeiring to his Debt, in respect it was a general Disposition omnium bonorum, of all host Debts, Sums of Money, Goods and Gear in General, without condescend- St. ing upon any particular, and bore in the Narrative. That forasmuch as the Disponer was not able to go about his own Affairs, and that he knowing the Diligence and Activity of the Defender, wherefore, and for Sums of Money, and other Onerous Causes, and good Considerations, he Disponed, &c. Because the said Disposition was granted on Death bed, and was by a Bankrupt, seing the Disposition being so General, without condescending upon any particular, he could have nothing remaining. It was Replied, That the Disposition, the Omnium Bonorum, ought to be sustained in Quantum; the Defender shall prove, That he was Creditor ab ante, and the Pre-Sumption that it was Fraudulent, as being Omnium Bonorum, is sufficiently taken off, by the Defenders proving, that Antecedent to the Disposition, he was Creditor. It was Duplied for the Pursuer, That a Disposition from a Nottour Bankrupt, could not be sustained to the prejudice of other Creditors, and that the Lords have decided in the like Case, where Diligence was done by neither of the Creditors, that the Creditors should come in pari passu, notwithstanding of a Disposition of that Na-The Lords found, That Diligence being done by neither Pursuer nor Defender, and that by the Disposition he was Nottour Bankrupt, nothing remaining that was not comprehended in the General Clause of the Disposition, that therefore the Pursuer and Defender ought to come in pari pass, effeiring to their Debts, notwithstanding of the Disposition. XCIX.

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Of Council and Seffion, 1685.

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XCIX. 6 November 1685. Innovation of a Bond.

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Olwart Relict of Reoch having purfued Reochs. her Husband's Children of the first Marriage, for Implement of her Contract of Marriage, viz.for payment of bygone Joyntures, & in time coming, her Active Title, being as Executrix Creditrix, she insisted against one of them, called Thomas for payment of 4000 Merks, and Annualrents, due by Sir William Nicolson, to the Defunct, (which Bond, he had delivered up to Sir William, and taken a new Bond in his own name,) or otherways, to assign Sir William's Bond to her: And the Lybel being referred to his Oath, he Deponed, and acknowledged, he had renewed the Defunct's Bond, in his own name. The Oath coming to be Advised. It was alledged, That the Bond was delivered by the Defunct to him, for his own behove, and that accordingly he renewed it, when he was on Death-Bed, as faid is, and that it was, in Satisfaction to him, of a Debt due to him, by vertue of his Contract of Marriage, long before the Pursuer's Contract of Marriage, which was the Ground of this Pursuit. The Lords found, That there being nothing instructed, that the Bond was delivered by the Defender's Father to him, in Satisfaction of that Debt: And the Oath, bearing nothing thereof, they found him lyable to pay the Money, contained in Sir William Nicolfon's Bond, granted to the Defunct, or otherways, to affign Sir William Nicolfon's Bond, which was granted in place thereof, to him. They were likeways of Opinion, (but it came not to be Decided) That altho it had been proven, that the Defunct had delivered up the Bond upon his Death-Bed, yet it not being a habile way to transmit it, it was not a relevant Defence. Diligona. prior temport

Executor Creditor, and Donator of Escheat competing.

It was alledged, 2do, for the Desender, That he, as Donator to his Father's Liferent Escheat, ought to be preserved, to the bygone Rents of Sir William's Bond, preceding the Desunct's Death. It was Replyed, That the Gift was obtained, not only after the Pursuer was Confirmed Executrix Creditrix, but likeways after she had recovered Sentence for this Debt, before the Commissars of Edinburgh, against the Desenders. The Lords preserved her, as Executrix Creditrix, to the Donator, in regard her Confirmation was before the obtaining of the Gift.

act. 9. P. 1669.

C. 10 November 1685.
Prescription of Arrestment in the Debitor's own Hands.

arg ab abrundo he regisle of arrestments To the Competition betwixt Alexander and John Schaws, who had Right, by Disposition from John Schaw, to certain Sheep belonging to the faid John, and which were also sold to John Mackeburoch on the one part, and Thomas Mackneiles, who had Arrested in the said John Schaw, the common Debitor, his Hands, on the other part. It was alledged for Mackneiles the Arrefter, That he ought to be preferred, because, before the Sheep were Disponed to the saids Schaws, he had Arrested in the said John Schaw, the common Author, his own Hands; after which, the faids Arrefted Goods were so Hypothecat, and really Affected, that they could not be Disponed by his Debitor, in favours of the Schaws. It was Answered, That the foresaid Arrestment, albeit in the Debitor's own Hands, was prescrived, there being no Diligence used thereupon within the five years. and there was no Speciality in Arrestments of this nature, from ordinary Arrestments in a Debitor's Hands, and the Act of Parliament anent Prescription was general, as to all Arrestments without Exception, and there was as much, if not more Reason, that this should prescrive, than the other, in regard there was no Record of Arrestments, by which the Leidges could come to the knowledge thereof, and it would utterly flop all Commerce, if the Buyer, or Receiver of Moveables Arrested, should be lyable for the Price thereof, fourty years. The Lords found, That the Act of Parliament anent Arrestments, being general, did extend to this Arrestment, which was in the Debitor's Hands; but thereafter, Interruption being offered to be proven, by Diligence done upon the Arrestment within the five Years, the same was found relevant.

Osp by fust to Disposition of Lands made by an Heir, to one of his Predecessor's Creditors.

He Lord Ballantyne, being Creditor to the deceast Lord Pressour in the Sum of 10000 Pounds, he intented Action of Reduction, against Robert Dundass of Arnistoun, of a Disposition granted by Prestoun, Son and Heir to the said deceast Lord Pressoun, wherein he did insist, upon the Reasons sollowing, viz. That the Disposition was grant ted by the said Pressoun, within Year and Day after the Desunct's Decease,

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to the prejudice of the Pursuer, who was a Creditor of the Desunct's contrary to the 24. Act. Pa. 1. Cha. 2. It was Answered, That the foresaid Act of Parliament, did only discharge voluntar Dispositions by the appearand Heir, whereby he satisfied his own Debt, and prejudged his Predecessors Creditors, but, that this Disposition, was for an Onerous Cause, viz. For payment, of certain of the Defunct's Creditors, mentioned in a Back-Bond, granted by the Defender's Father: And it was clear, both by the Rubrick, and Statutory Part of the Act, That it was only a Remedy against the Creditors of the appearand Heir, but that it did not stop the appearing Heir, from Disponing of the Desunct's Estate, for payment of his Creditors, such as he thought fit. 2 do, That the Defender's Author, viz. the faid Prestoun, was not appearand Heir in these Lands Disponed, he being inseft, by vertue of a Disposition from his Father before his Death; which Infeftment, albeit it did bear, That the Son should be obliged, and lyable, to pay all his Father's Debts, contracted, and to be contracted, ficklike as if he were ferved Heir to the Father; yet, the Son had thereby a Qualified Fie, of the faids Lands, and neither needed, nor could be served Heir to the Father therein: And that it was so, was evident, seing the foresaid Fie did preclude all the King's Casualities; so that neither Waird, nor Marriage, could fall by the Death of the Father. The Lords did not determine the first Point, whether the appearand Heir might Dispone, for the Satisfaction of any of his Father's Creditors, within the Year: But they found, That the Defender, being inseft, before his Father's Death upon the foresaid Disposition, was in Fie of the saids Lands, and so was not appearand Heir therein. D. 1xxxii. qualinonsas

Difference of these Expressions, Oblig'd to pay the Father's Debts, Protong grand and, with the Burden of the Father's Debts.

The Pursuer's Second Reason of Reduction was, That the Qualification on contained in the foresaid Disposition, viz. That the Son should be ly able, and obliged to make payment of all the Father's Debts, contracted or to be contracted, being insert, both in the Procuratory of Resignation, and Precept of Season, was real, and did affect the Lands Disponed, althour transmitted to the Desender, who was a Singular Successor. It was Answered, That the Conception of the Clause was but personal upon the Son, being conceived in these Terms, That the Son should be obliged, and found lyable for the Father's Debts, sicklike as if he had been served Heir. The Lords found, That the Disposition not bearing, to be with the Burden

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of the Father's Debts, altho the Clause was repeated, both in the Procu. ratory of Relignation, and Precept of Sealin, yet it did import no more. than a personal Obligement upon the Son, to pay his Father's Debts, but did not affect the Lands, in the Defender's Person, who was a Singular Successor.

> November 1685. Adjudication for Relief, albeit there be no payment.

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Infoffment for whof Here being a Quærie proponed by Mr. Roderick Mackenzie Clerk. shewing, That Robert Burnet Writer, being Cautioner for Veatch of Dawick, and being distrest by Registration of the Bond, and Horning thereon, but had not made payment of the Debt, the said Robert, upon the Clause of Relief of the said Bond, had intented an Adjudication of Dawick's Lands, that he might come in pari passu with other Adjudgers. Question being, Whether, (albeit he was distressed, yet not having made payment,) he might adjudge for his Relief. The Lords found, at That he might adjudge, and that the Adjudication was equivalent to an Infestment of Relief, and was only to take effect for such Sums, as Robert Burnet should happen to pay, by vertue of the said Distress, and that from the time of his payment: And therefore, ordained the Decreet of Adjudication to be extracted, bearing the foresaid Provision.

CIII. 24 November 1685. Donator of Bastardie.

der beforehogitt. Toute Her. afterio intremission. Eorge Galbraith being Creditor to the deceast Gib, obtai-I ned a Sentence against Abigail Deans, as Donator to the Bastar-Gib her Husband, for payment of the Debt, the Suspended upon this Reason, That the Decreet was against her in absence, Reletion of and that the had ince obtained Moveables. It was Answered, That the Debt being constitute against her by a Sentence, and the having intrometted and possessed, as Donator to the Bastardie, she could not, by a alm subsequent Title, ex post facto acquired, and after Sentence was recovered against her, prejudge the Creditors, who had jus acquisitum, seing the, as Donator of Baltardie, was lyable to pay all her Husband's Debts, quoad vires bæreditatis. The Lords found, That the Debt being constitute against her, as Donator to the Bastardie, she could not, by a subsequent Title

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Title of Escheat, prejudge the Charger: And therefore, the Lords or dained her to Depone upon the Quantity, and Species of her Intromission, and allowed her Retention, as to the Priviledged Debts, such as House-Maills, Servants Fees, Expenses of both Gifts of Bastardie and Escheat.

CIV. Eodem Die. Reduction of a Bond,

a Jour minor Cofton . Jackby anhanan THe Arch-Bishop of St. Andrews, having charged the Magistrats of Glafno obichion or dehal 94ablems

gow, upon a Bond of 20,000 M. granted to him, when he was Arch-Bishop of Glasgow, by their Predecessors Magistrats, they suspended upon these Reasons, 1mo, It was acknowledged, that the Bond was granted for a Tack of the Teinds of Glafgew, and the Town being Minors, they ought to be reponed, in so far as they were prejudged, and lesed by the Deed of the Magistrats; and that true it was, they were prejudged by the granting of this Bond, because the Teinds set, were not of an adequat value, to the Sum contained in 2do, That the Tack was no fufficient Security, it being fet by the Bishop, by way of Anticipation, before the expiring of the old Tack: As also, that the Entry of the Tack was Collatum in indebitum tempus, viz. at Michaelmass 1684; Whereas the present Bishop's Conge de Eslire came down before that time, so that the Charger was no more Bishop there. It was Answered for the Bishop, That there was no Lesion in the Tack, being of a far greater value than the Sum in the Bond. But, 2do, It was not relevant, the Transaction being betwixt him and the Magistrats, who were majores & scientes, and denyed, that the Town was in the Case of Minors. And, 3tio, That the Nullities of the Tack were not competent to be proponed by the Magistrats, there being no Eviction or Distress, and that they could not quarrel their own Right. The Lords repelled the first Reason, reserving Action to them against the Magistrats for the time, they repelled likewise the second Reason, the Tack not being yet quarrelled nor reduced: And also, in regard they would not allow them to quarrel their own Tack.

CV. 27 November, 1685. Caution in a Suspension.

Ore having Charged Finnison for payment of a Sum of Money, conform to his Bond, he Suspended upon a Reason of Compensation, and found Cautioner in the Suspension; and the Suspension having come in the last Session to be discussed, the Reason of

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Suspension, sounded upon Compensation, was found Relevant, and proven. and the Letters are Suspended Simpliciter; but the Decreet of Suspension having lyen over unextracted, the Charger obtained a Decreet, against the Suspender, for the Price of certain Bolls of Victual, and did now propone Re-compensation, wherethrow the Compensation was elided, fand the Letters found orderly proceeded against the Suspender: The Cautioner in the Suspension, gave in a Bill craving, That he might be Affoilzied, in regard, the Reason of Suspension sounded on the Compensation, was found Relevant and proven, but that the same was now elided by an emergent Re-compensation, and instanced the Case betwixt Mr. Robert Colt and Somervel, and Others, the 2 January 1683. The Lords Suspended the Letters Simpliciter, quoad the Cautioner, notwithstanding that it was alledged for the Charger, That the Ground of Re-compensation, was extant, before the Suspension, albeit it was not liquid till after the foresaid Decreet Suspending the Letters. This aller by act of action of Cyforenter.

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m. Buffer CVI. Eodem Die. Aliment.

HeLaird of Kirkland having nothing to live upon, pursued his Mother and Grand-mother Liferenters of his Estate, for an Aliment. both for by-gone years, and in time-coming. It being alledged Byoner for the Grand-mother, That she could not be lyable for any part of the heir separot Aliment, because she had quit and given down 800 Merks to her Son the Pursuer's Father. 2do. That she offered to Aliment him. And, 3tio. As he to by-gones, she could not be lyable, there having never been any Process intented therefore. It was answered, That whatever she had quit to the Father, was by Paction, and that notwithstanding thereof, the Purfuer had nothing to Aliment him, the hail Estate being Liferented, either by the Grand-mother or Mother. To the 2d. That he being an Infant, his Mother would be preferred to the Alimenting of him, rather than his Grand-mother, neither was the offer to Aliment Relevant to elide the pursuit. The Lords Repelled the first and second Defences, and sustained the 3d Defence, and Assoilzied from by-gones, and found that the Liferenter was not lyable preceeding the intenting of the Cause, which Tother Sin Bond was but newly intented.

CVII. Eodem Die. Debitor non præsumitur donare.

fay Looper Ean Robertson having pursued her Father's Heirs, for payment of 500M. J left in Legacie to her by John Robertson, which was uplifted by her Eather

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Father as Administrator in Law to her. The Defender alledged Absolvitor, because the Pursuers Father, in her Contract of Marriage with her Husband, contracted 5000 Merks with her, which ought to be ascribed pro tanto, in satisfaction of the said Legacie. It was answered, That her Father was obliged to pay her Tocher, albeit he had not been her Debitor the manner lybelled, and that he had only Tochered her, fuitably to his own Estate, he being a Gentleman of 2000 Merks of Rent. It was Replied, 'That albeit by the Roman Law, the Father was obliged to Tocher his Daughter, yet there was no Obligation by our Law upon the Father to Tocher his Daughter; and that therefore, what he had given, was to be imputed and ascribed in payment of his Debt in the first place, seing debitor non præsumitur donare. It was Duplied, Whatever might be faid. if the Father had granted a Bond of Provision to his Daughter, that the Tocher might be ascrived in satisfaction thereof; yet in this case, where the Legacie was Adventitious, proceeding from a Stranger, and where the Pursuer's Contract of Marriage did not bear in Satisfaction, the Defence could not be sustained. The Lords sustained the Desence, and found. That where a Tocher was provided in a Contract of Marriage, with a Daughter, it was prefumed to be in Satisfaction of the foresaid Legacy which she could crave of her Father, party Contracter of the Tocher.

CVIII. 2 December 1685. Judicial Ratification.

N the Poynding of the Ground, pursued by the Lady Bathgate, upon an Infestment of Annualrent of 2500 Merks out of the Land of Bath-There being Compearance made for the Creditors, and particularly for Cochran of Barbachly, who had Right to several Infestments of Annualrent, and Comprysings upon the Estate. And it was alledged for him, That there could be no Poinding of the Ground, as to 1300 Merks of the said Annuity, because the Lady had disponed the same in savours for her Husband's Use and Behove, and which was ratified judicially upon Oath. It was Answered, That the foresaid Dispo-If sition was never a delivered Evident, and was now in the Hands of the Granter, and produced by her. It was Answered, That the same being judicially ratified, it did necessarly infer, that the said Paper was delivered. It was Duplyed, That the Ratification, being accessory, followed the principal Disposition: And there was nothing more ordinary, than Women to ratifie Dispositions before the Judge Ordinary; and yet, to retain

ac-opearing forty mlerge. suproposing pombous.

retain both Disposition and Ratification in their own Hands, until Affairs be finally ended. The Lords found the Objection of not Delivery relevant, being now produced in the Granter's Hand, and that the Defence was noways elided by the Ratification upon Oath.

CIX. 4 December 1685. Personal Creditor.

Ing Stradictor Disc. The Lady Tester, and Lord Tester for his Interest, having pursued my Lord Lauderdale, as lawfully charged to enter Heir to the deceast Duke of Lauderdale, for payment of 10000 Pounds Sterlin, contained in two Bonds, granted by the said Duke, in favours of my Lady Tester his Daughter: My Lord Lauderdale having renunced, my Lady Tester did insist for a Decreet cognitionis causa. My Lord Lauder dale thereafter compeared, as a Creditor to the deceast Duke, and alledged, that there could be no Decreet cognitionis causa, because, he offered to prove, and instantly to verifie, that these Bonds were satisfied and discharged. It was answered, That the same was not competent to my Lord Lauderdale, he being only a Personal Creditor, and so could not stop the Lady Tester from doing her Diligence, she being going on to Adjudge, especially seing he was not legittimus contradictor; for whatever did come of this Debate, the Lady Tester was not tuta exceptione rei judicatæ, seing all the Perfonal Creditors might claim the same Priviledge, and that if a Personal of Creditor, while the Debitor was alive, could not be admitted to propone a Desence of payment to stop Diligence, where the Debitor himself did not compear, so neither, he being dead, is it competent to a Creditor of the Defunct, to stop Diligence contra Hæreditatem jacentem. It was Replyed for my Lord Lauderdale, That the Pursuer could not but acknowledge, that, after Diligence is done, every one of the Real Creditors might separatly impugn one anothers Debts; so that albeit a Creditor succumbed, yet there could be no Security, exceptione rei judicatæ, against the rest. 2do, The Pursuer had no prejudice, in regard there was no Delay craved, and there was no anterior Adjudication upon the Estate. The Lords found, That my Lord Lauderdale, as a Creditor, might be admitted to propone the foresaid Defence of payment, the same being instantly verified, and that it was competent to him, to stop the Constitution of any Debt, that might affect the Hæreditas jacens, which was the Subject of the payment.

CX.

CX. 8 December. 1685. Tutor.

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Urham of Omachie having pursued an Action of Removing against the Lady Ethie-Betton, wherein he lybels, That her Husband was his Tutor or Pro-Tutor, and that Durham of Omachie his Grand-Father, to whom he was appearand Heir, died in the Possession of the Lands of Ethie-Betton, and that the said Tutor had destroyed, or given back the Pursuer's Grand-Father's Right to the saids Lands, and had taken a new Right in his own Name: And lest it should be interpret to be to the behove of the Pupil, (being acquired by the Tutor) the same has been destroyed, and a new Right taken in the Relict's Name: And therefore, the Minor ought to be restored to the Possession, in which the Grand-Father died, and that the Defender ought to be removed. It was alledged for the Defender, That the Defunct having no Heretable Right, but allennarly Temporary Rights, such as a Right to the Liferent, and a Gift of Waird, the Tutor might acquire an Heretable Right after that was elapsed, and continue in the Possession by vertue thereof: And therefore, cannot be obliged to cede the Possession, feing the Pupil had no Right, which might be the Title of his Possession. It was Replyed, That the Tutor being Master of the Pupil's Writs, the Purfuer was not obliged to debate what Right his Grand-Father had, but he ought to be put in his Grand-Father's Possession by the Tutor, seing the Tutor cannot alledge, that he was excluded, by any from the Possession; via juris. The Lords found, That the Pupil was not obliged to Debate, what was his Grand-Father's Title, but that he ought to be reponed to the Poffession of his Grand-Father, the time of his Death, continued by the Tutor, and his Relict fince his Death, referving to the Relict, to recover the Possession by vertue of her Title, as accords of the Law.

CXI. 9 December 1685.

Application of the Price of Lands, Inhibition.

CXI. 9 December 1685.

Consent to alway and form of price of fine professing one of the price of Lands, Inhibition.

CXI. 9 December 1685.

Consent to alway and form of price of lands, Inhibition.

B Aillie Mackintosh, and the Laird of Drum-Somervel, having recovered a Decreet for making Arrested Goods forthcoming, against Sir Will liam Primerose, as he who was Debitor to the Laird of Humbie, in certain Sums of Money, as the Price of the Lands of Crichton, sold by Humbie to him: And Sir William Primerose, having Suspended upon Multiple

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Poynding, and the Suspension being called, There was Compearance for Hepburn of Randerstoun, Humbie's Brother, and it was alledged, That Humbie having Resigned his whole Estate, whereof the Lands of Crichton were a part, in favours of himself, and the Heirs Male of his Body: Which failzieing, in favours of Randerstown and his Heirs Male: Which failzieing, in favours of the Lady Tarras. with this express Provision, That it should not be lawful to Humbie to Alienat the Said Estate, or to Contract Debt, without Consent of certain Friends therein-mentioned, or such of them as should be on Life: As also, That it should be lawful, to the Said Persons, to name other Persons to succeed in their Room, in sase of their decease, declaring, That Deeds without the Consent of their Friends, should be Null: Likeas, upon the forefaid Clause, there was Inhibition served at the instance of the foresaids Persons, And alledged, That Sir Robert Hepburn, who did Consent to the Disposition in favours of Sir William Primross, did make Application of the Price, towards the payment of the particular Creditors named in the List; and that this Pursuer's Debt, was unwarrantably contracted, against the Nature of the Tailzie and Inhibition. It was answered, That Sir Robert having Consented to the Vendition of the Lands, he was functus, and had no Power to apply the Money to the Payment of these Creditors more than others, especialy, not having adjected that Quality to his Confent to the Alienation, neither having incontinently made that Application, but ex intervallo, seing by the Consent there was a Security made out to the Buyer, wherethrow by the Articles of Agreement, the Price came due to Humbie the Seller, and consequently was affectable by his Creditors; Likeas, the Price being moveable, could not be affected by an Inhibition, or Interdiction. The Lords found, That Sir Robert having Consented to the Alienation, without any Qualification, and not with the same Breath, having made Application, he could not ex intervallo prefer anypersonal Creditor to the Pursuers Diligence, and therefore preferred the Arrester, the Money being Moveable, and so fell not under the Inhibition.

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CXII. Conditions of Consignation of a Disposition, how Probable.

But thereafter It was alledged, That altho the Disposition was Anterior in date to Sir Robert's Destination foresaid of the Price, yet they offered

Communers, that the Disposition was consigned in Sir John Cunninghame's hands, not to be given out to Sir William Primrose untill the Destination by Sir Robert should be drawn and Subscribed. It was answered, That the Disposition being now Registred, and not in Sir John Cunningham's hands, and the Articles of Agreement making no mention of any Application of the Price, to be made by Sir Robert in behalf of these Creditors more than others, the Consignation and Conditions thereof could not be proven but scripto vel juramento. The Lords found, That the Depositation and Condition thereof could only be proven scripto, vel juramento of the Arrester.

CXIII. Arresters and Donator of Escheat Competing.

Hereaster It was alledged for Randerstoun, That he ought to be preferred, as having the single and Liferent Escheat of his Brother
Humbie, declared before the Arrestment. The Lords found, That as Donator
to the single Escheat, he could have no interest in the Price albeit moveable, because the Subject was not existent, neither the time of the Gift,
nor within Year and Day thereaster, and that as Donator to the Liferent
he had consented to the Alienation, and had gotten from Sir William
30000 Merks. D.

CXIV. Eodem Die. Wodsets.

Obert Cunningham having granted a Wodfet of the Links of Kinghorn plague or joa to David Dowie, Redeemable upon payment of 1000 lib. which That the Granter of the Wodset should pay the publick Burdens: There is a Summons raised at the instance of Cunningham against Dowie, craving that Dowie might Compt for the Superplus Duty of the Lands over and above the Annualrent, and that from the date of the Wodset, in regard the Wodset was improper, the Granter of the Wodset being obliged to pay the publick Burdens and that there was no hazard that the same could be waste, it being Grass, lying at the port of Kinghorn, which the Town could not want. The Lords found, That there were other hazards, viz. Plague and War, which were mentioned in the Act of Parliament, and which the Wodsetter was lyable to, and had no Relief from the Granter of the Wodfet, and therefore found him lyable to Compt not from the Date of the Wodfet, but from the Date of the offer of Cau-Theretion.

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Therefore It was alledged, That the Wodsetter behoved to be lyable at the least from the date of a Minut of Agreement betwixt the Pursuer and Desender, whereby the Wodsetter, did restrict his Wodset Money, for Itoo Merks, which the Granter of the Wodset obliged himself to pay at Martinmas thereaster, and which Itoo Merks the Wodsetter was obliged to Accept, and Renunce the Wodset, at the least he ought to Compt for the Annualrent of 400 Merks, or a Proportion of the Mails and Duties of the Wodset Lands effeiring to the 400 Merks, being compared with the ItooMerks yet standing upon the Wodset. The Lords found, That the Restriction did not alter the Nature of Wodset, therefore found him only lyable to Compt, from the date of the offer of Caution, and declared, That from that time he was only to have Allowance of the Annualrent of the Itoo Merks to which the Wodset was Restricted, and to Comptsorthe Superplus Duty.

Hamble declared before the Arrelanemalle Lords band, that as to the fact the fact of the could have no invend the fact the bank.

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the Cremer of the Wooden, and therefore found him looks to Course

rom the Date of the Wolfer, but from the flate of the offer of C

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Of the Matter in the Decisions of the Lords, observed by President Falconer; Containing not only the Determination of the Lords in the Case, but also the Positions in Law made use of in the Pleading which may serve for an Alphabetical Compend, D. stands for Decision, and P. for Page.

A CTION OF DAMAGE,

Action of Danninge. D. lxxix. p. 54.

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ACTION OF FURTHCOMING,
Action of Furthcoming vide Arrestment, walkening of furthcomings within the ten years interrupts Prescription. D. xcv. p. 65, Actions of furthcoming raised before the Act Parl. 1669. must be wakened in ten years after the Act; and if raised fince that Act, within ten years after commencing the first Action, 1bid. After the first wakening the Action of furthcoming, must be wakened every five years, to be compted from the date of the first wakening, 1bid.

ADJUDICATION.

An Adjudger cannot remove Tenents to the prejudice of Co-adjudgers, except he find Caution for the Duties. D. v. p. 2. when there is no Probation of the Rental, or Lands allocat to an Adjudger, he ought not to adjudge for a fifth part more, D. vi. p. 3. If in that case, he do adjudge for a fifth part more, there is no Accumulation nor Annualrent upon Annualrent allowed him . 1bid. A Citation upon a Summons of Adjudication, is equivalent to a Comprising and Charge against the Superior; and the Decreet following upon that Citation, is preferable to an Infeftment of Annualrent, constitute after Citation, but before the Decreet of Adjudication. D. xix. p. 10. a Citation upon an Adjudication, has the force of a Comprising, in competition with voluntar Rights, but not in Competition with legal Diligences, fuch as Arrestments, D. Ixxvii. p. 52 . A Creditor, when an Infeftment of Annualrent is constitute in favours of his Debitor, may adjudge a fifth part of it more than his Credit, as if the fame were Lands; It being found, that the Act of Patliament extends to Annualtents, as well as to Lands.

D. xl. p. 22. Topicks of pleading, why a fifth part of Annualrents should not beadjudged. Ibid. An Adjudication may be led upon a Wife's Contract of Marriage for payment, not only of bygone Annuities, but in time coming, the Terms of payment being first come- D. laxv. p. 50. All Adjudications are not for liquid Sums. Ibid. Some Adjudications are founded on Obligations adfaciendum, and for Security. ibid. The legal of an Adjudication for Security never expires. An Adjudger has right to the Mails and Duties from the date of the Decreet of Adjudication, but not from the date of the Citation. D. lxxvii. p. 52. Adjudications general of the whole Estate, can only be deduced for principal Annualrents and Penalties, and not for a fifth part more, which is only competent in Adjudications, particular of a certain parcel of the Estate effering to the Sum. D. lxxxiv. p. 58. All Adjudications led fince the 24 of Rebruary 1684. contrary hereto are declared by A& Sederunt to be Null, and the Adjudications led before that. time are reftricted to principal Annualrents and Penalty. Adjudications of the principals Estate, at the instance of Cautioners distressed are allowed, albeit the Debt be not payed. D. cii. p. 72. Such Adjudications are like Bonds of Relief, they only rake effect for fuch Sums as the cautioner pays, and that from the time of the payment. ibid. vid. D. xxx. p. 15.

ALIENATION.

The Clause de non alienando, how far sustained in Rights to precious Moveables. D. liv. p. 34.

ALIMENT.

In an action of Aliment against a Liferenter, at the instance of an apparent Heir, the Estate is to be considered as it was at the Desenders Husbasids death, when her Liferent began; so that if the Estate was not then exhausted by Liferents of Debts, no Aliment will be due.

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D. xx1.p. r rThough a Liferenter shouldby Pastion quite part of her Jointure to her Husband or Creditors; yet she will be liable in an Aliment to the Heir, D. cvi. p. 74. An offer to Aliment the Heir, is not sufficient to elied this action of Aliment. ibid. The Heir being an Infant, the Mother will be preferred to the Grand-mother in Alimenting him. Ibid. No Aliment can be craved to the Heir for years and time preceeding the intenting of this action of Aliment. Ibid.

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ANNUITIES.

A Wife being infeft in an Annuity out of a Tenement of Land, the Husbands Heir is liable to make it habitable, and if it become ruinous, will be personally liable for that Anautry till it bere-built. D. xvi p. 7.

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A Tocher payable to the Husband, which was to be eiked to an other Sum of his own, to be imployed for the Wifes Liferent, being arrefted. The Lords Inflain action of furthcoming, the Creditors finding Caution for the Wifes Liferent of both Sums. D. xvi. p. 8. An Arrestment and furthcoming, do not make Sums contained in Apprising, moveable. D. zliii. p. 23. The Act of Parl: 1669. anent Prescriptions of Arrestments, extends to these Arrestments which are laid on in the Debitors own hands, and generally to all Arrestments, D. c. p. 70. By an Arrestment in the Debitors own hands, his whole goods are so Hypothecated, that they cannot be disponed. Ibid.

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Bankrupt, and at the Horn, is not sufficient, except the Horning be at the instance of the Pursuer, the common Debitor Merchandiseing all the time. Ibid. A Merchan tho' at the Horn, will not be reputed Bankrupt. if aftert granting the Right quarrelled, he used Trading. Ibid. A Disposition omnium bonorum, by a Debitor to one of his Creditors does not prejudge others, who will come in part passu, albeit no Diligence be done by others; And the speciality is, That Diligence was not done either by Pursuer or Defender. Discouling 168. Disposition omnium bonorum to one Creditor, makes the disponer notiour Baukrupt quo ad the rest. Ibid.

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A Donator of Bastardy is only liable Secundum vires haveditatis. D. cili, p. 72.

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Conversion of Victual payable to a Bishop into Moneyrent, is a Contravention of the Act of Parliament 1585, and the Tack or other Write containing that Conversion, reduceable. D.lxi. p. 41. Teind-duties and Stipends due to Bishops. cr. other Titulars, not being of the inserior Clergy, prescrive not within five years: And the Act of Parliament 1669, anent Prescriptions, belonges not to Bishops Stipends, D. lxii. p. 41. The power of Bishops over their Temporality, D. lxxxviii. p. 60. Bishops cannot Tax their Waird-holdings to the prejudice of their Successors, 1bid. p. 61.

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When Magistrats of a Burgh make a Bargain in Relation to the Towns Assairs, the Burgh will not be allowed asterward to quarrel the Deed as done to the prejudice of the Community, who are Minors; but they will be referved personal Action against these Magstrats who made the Transaction, D, civ. p. 73.

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When an Adjudger is bound to find Caution for the Mails and Duties, D. v. p. 2. vid. D. lxxxix. p. 6. Cautioner in a Suspension. vid. Suspension.

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ACTS
SEDERUNT
LORDS

Council and Session

From the Year 1681, to 1696.

EDINBURGH,

Printed by James Watson, for John Vallange Book-seller, and are to be sold at his Shop on the North-side of the Street alittle above the Cross. M. D. CCI.

MAHGE OUDDER and Delificity Special representation and Margaria a Control of February Salpa, for July Pality Control Special 0



ACTS OF SEDERUNT

THE

LORDS of the SESSION,

Past since February, 1681.

abent. ACT allowing all persons to sell Flesh in Edinburgh on the Mercat days. ad 122 P. 1940 February 17. 1632.

HE Lords of Council and Session Considering, That by the 122. At of the seventh Parliament of King James the 5th, it is Statute and Ordained, That upon the three Mercat days Weekly, all manner of persons, both to Burgh and Landward, stall be free to come and sell Flesh in the Town of Edinburgh, for the furnishing of Our Soveraign Lord, and his Leidges, and others repairing to the Said Town; And it being the general concern of all his Majesties Subjects, who have occasion to refort to, and reside in the Town, attending the Supream Judicatories of the Kingdom, that so just and necessary an Act beduly observed; and that some persons upon pretence of Priviledge or Custom, may not take on them to have the only Right to fell Beeff, or other Boutcher Flesh in the said Burgh, excluding others, and thereby exact exorbitant rates at their pleasure: Therefore the Lords of Council and Session, in pursuance of the said A& of Parliament, Do require the Magistrats of Edinburgh, to take care, that in time coming, all perions whatfoever be allowed liberty and freedom upon the ordinary Flesh-market days each Week, viz. Tuesday, Thursday and Sa-The mercal day mentioned in to above act in Allo year 1540. wer Sunday,

Munday & Phurtday.

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turday, to bring in to the Town of Edinburgh, Beeff, and all other Bonfcher-Flesh, and to sell the same in the Mercars, in the same manner, during the same space, and as freely in all respects, as the Fleshers Burgesses of of the faid Burgh, and of other Royal Burghs within this Kingdom, are in nie to do; and that the Magistrats allocat to the saids persons, convenient places in the Mercat, where they may be accommodat with Shambles. Stocks and Stands, for breaking out, and felling of the Fleshes brought in by them: And to the effect this may be made publickly known, the faids Lords appoints the Magistrats of the said Burgh to issue a Proclamation conform to this Act, and to cause Print and Publish the same, in the usual manner, betwixt and the twenty two day of February instant, and to be careful that due obedience be given thereto as they will be answerable.

ACT, concerning the passing of Bills of Suffension upon Juratory Caution, November 8. 1682.

THE Lords of Council and Seffion Confidering, the inconveniencies mobbe from wicoul siency that may ensue from the frequent passing of Bills of Suspension upon Juratory Caution, The Chargers for the most part, having no notice, that they might object against the same: For preventing whereof, StatuThe Lords do Ordain, that in time coming, when any person is to give in a Bill of Suspension, that he cause a Notar make previous Intimation thereof, (bearing the Particular day) before Witnesses, to the Party Charger The prevision of personally, or at his Dwelling-place, if he be within the Kingdom, and that the Instrument of Intimation be produced with the Bill, and that the Bill be given in to the Clerk within fix days, after the day mentioned in the Instrument, otherwise that a new Instrument be taken before the Bill be presented, and that the Ordinary on the Bills, in time of Session, before Reporting the Bill, containing Caution; and the three Lords Ordinars, in time of Vacance, before passing such Bills, acause publickly call the Chargers, against whom the faids Instruments are produced; And the Lords do Ordain, that the Suspender shall Depone, whither he hath Lands in Property, or Liferent, or Bonds, Tickets or Contracts, containing Sums of Money; and in case he acknowledge the same, that he condescend thereon, and Depone that he has no other Lands belonging to him, nor Bonds, Tickets, or Contracts, containing sums of Money, and that this be part of his written Oath; And that the said Suspenders, before expeding of the Bills, shall Consign in the hands of the Clerk of the Bills, valid and sufficient Dispofitions of the Lords of Session

fitions, or Assignations (at the sight and appointment of the Lord Ordinar) of the saids Lands and Sums of Money. And in respect Parties do always offer sufficient Caution in the Bill of Suspension, to rheested the same may the more easily pass, and thereafter apply for a Supplement; whereas, if the Ordinary who past the Bill, had been acquainted, that sufficient Caution was not to be given, he would have been more strict in sinding the Reasons relevant. for passing the same; Therefore the Lords do Ordain, that no Bills of Suspension, bearing offer of sufficient Caution, shall be exped upon Juratory Caution; But that the Party Suspender shall give in his Bill, bearing Juratory Caution, and that the Ordinary may consider the Reasons, with respect to the Juratory Caution as if the former Bill containing the same Reasons had not been past; And the Lords Discharges the taking of Oaths in Supplement by Commission; And finds that the Suspender must compear and Depone before the Ordinary on the Bills, and that no Charge to set at Liberty be past upon Juratory Caution.

ACT, ordaining the Clerks of Session to take Bond of their Servants, not to Agent in Processes. November 28. 1682.

He Lords of Council and Session, Considering, that albeit by the Act of Parliament concerning the Regulation of Judicatories, It is Ordained, That all the Agents be debarr'd the House, and not permitted to Negotiat in, or manage Processes; And it is recomended to the saids Lords to see the same punctualy observed; Yet some Servants in the Clerks Chambers, presume to be ordinary Agents for the Parties in Processes, molibe from which is a direct contravention of the Act of Patliament, and of dangerous consequence, that the Clerks Servants, having under their Masters. the trust and custody of Processes, and of Writs produced therein; and being imployed in Extracting of Acts and Decreets, should be Agents in these Processes: Therefore the saids Lords, do Require the Clerks of Session, to cause all their Servents, in their respective Offices, give Bond, that during their Service, they shall not Agent in Processes, for any of the Parties, un-100 tohios. der the pain of an hundred pounds scots, toties goties, to be put in the Box, quettos. to be disposed of at sight of the Lords; and that they cause any persons whom they shall hereafter take in, to serve them in their Chambers, give the faid Bond at their entry; And the Lords recomends to the Lord Register. ster to see this Act put in punctual execution.

ACT

ACT, concerning Comissions to Sheriffs in that part, for giving Infeftment.

January 20. 1683.

The Lords of Council and Session considering, that his Majesty doth fometimes sustain prejudice by the granting of Commissions to certain persons, as Sheriss in that part, for giving Infestment, in regard these persons, who ought to receive the Retoured Duties, and be countable for the same, are sometimes insolvent; For remeid whereos, the Lords do Ordain. That any Warrand to be past by them hereaster, to the Director of the Chancellary, for granting a Commission to a Sheriss in that part, for giving Infestment, shall contain this Clause. That before the expeding of the Commission, Caution be found to the Lord Theasurer, or Theasurer-deput, That the Sheriss in that part shall be countable for the Retoured Duties, and that the same be attested, under the hand of one of the Clerks of Exchequer, and that the Director Record the Commission in the Books of the Chancellary.

ACT, concerning the payment of the Secretaries Dues, where Reason of 2 Suspension, are discussed upon the Bill.

November 6. 1683.

He Lords considering that by an Act of Sederunt, dated the twenty fourth day of January, 1679. It is Ordained that the Lord Secretaries Dues should be payed, where the Reasons of Suspension. are, by warrand of the Lords discussed upon the Bill, sicklike as if the Suspension had been past and expede at the Signet: And to the end the said Act may be made effectual, The Lords Ordain, that in time coming when any Warrand shall be given by them, for discussing the Reasons of Suspension upon the Bill, either upon Petitions presented to that purpose, or upon Report from the Ordinary upon the Bills, that the Suspender do Imediatly make payment of the Secretaries Dues, to the Keeper of the Signet. nouerfandiand obtain his Recept of the same, either upon the back of the Bill, or on a Paper a part; and if the same be not done before the Bill be called by the Ordinary upon the Bills, the Lords impowr the Ordinary to refuse the Bill of Suspension, and appoint the Letters to be put to surther execution, notwithitanding of any former Warrand fifting execution, or appointing the Realons to be discust upon the Bill.

of the Lords of Sellion

Warrand for Letters of Horning for delivery of Consigned Money, to the project.

Clerk of the Bills, December 22. 1683.

He Lords of Council and Session considering, that it is just and reafonable, that any sums of Money, which were Consigned in the
hands of the Clerk of the Bills for the time, should be transmitted for to the present Clerk of the Bills, to be keeped by him, and to be made furthcoming, to the respective parties who shall be found to have right thereto:
Therefore the saids Lords Ordain Letters of Horning on sisteen days to be
direct, at the Instance of the Lord Register, against any persons now living
who were Clerks to the Bills, and against the Representatives of those who
are deceased, Charging them to give up, and deliver to the present Clerk
of the Bills, all sums of Money which were Consigned in their hands, during the time of their exercising the said Office, as the same are marked in the
Records of the Office, and which were not given up again to the Parties, by
warrand of the Lords; and ordains these Presents to be insert in the Books
of Sederunt.

ACT Ratifying the Act of the Faculty of Advocats, anent the Payment of Dues

by Intrant Advocats. January 28. 1684.

He which day, anent the Petition given in to the Lords of Council and Session, by the Dean and Faculty of Advocats, shewing, That where the Lords, by their Act of Sederunt, dated the Twenty eight of February, one thousand siex hundred and sixty two Years did ordain all Advocats admitted fince January One thousand six hundred and tourty eight, and deficient in payment of their dues to the Faculty, pay ble to them for the use of their Poor, and other Publick Affairs, and all who should be admitted thereafter to pay the same; and ordained Letters of Horning and Povnding upon six days to be direct against such Deficients, upon a Subscribed Roll. given in by the Thesaurer of the Faculty, and no Suspension to pass thereof but upon Confignation: And fince that time the Faculty having founded a Library for themselves and the Colledge of Justice, which is come a very great length, and do further intend to erect a profession of Law, and to do several other things towards the advancement of that Study in this Kingdom: They by their Act dated the First day of January, One thousands fix bundred seventie eight Years, unanimously augmented the saids dues upon Intrant Advocats, to five hundred Merks, to be Payed by fuch as should enter in the ordinary way upon Examination, and to a thousand Merks upon such as should importune the Lords to enter by Bill, or any extraordinary manner, which few or none hitherto have refused to Pay being sensible of the good

good of so useful a Work: and therefore craving, that the Lords would be pleased. for the encouragement of this honourable and useful designe, to Authorize the said Act of Faculty, and ordain Letters of Horning to passagainst all Defficients of the saids Dues, and no Suspension to passthereof. except upon Confignation, as formerly; or otherwise that the Lords would be pleased to ordain them to be debarred, ay and while they Pay the samen; Which Petition, and Defire thereof, being Read, Heard, and Confidered by the laids Lords; and they being therewith well and ripely advised. The Lords of Council and Session have approven, and hereby approve of the Faculty their erecting of their Bibliotheck, and of their design for establishing a Professor of Law. as a thing useful and expedient for the Colledge of Justice, and profitable for the whole Nation: And for their better encouragement, and enabling them in the profecution of such a publick and necessary work, The Lords have Ratified and Approven, and hereby Ratifies and Approves, the Act of the Faculty, dated in January One thousand fix hundred seventy eight, Imposing the Sum of five hundred Merks Scots upon all Advocats entering in the ordinary way, by Examination, and the Sum of one thousand Merks upon all fuch as do enter extraordinarly by Bill, without Examination, to be Payed to the Thefaurer of the Faculty for the time; and have allowed, and hereby allows the faid Act to be put in execution against all Advocats who have entered since the said Act, and have not payed the faid Dues, or shall hereafter enter, by debarring of them from their Imployment, as Advocats, ay and while the faid Dues be payed; Referving always to the Lords a Power of Modification of the Sum of five hundred Merks, Payable by fuch Advocats, as shall enter upon Examination, where they shall find Cause; And Ordains these presents to be Insert in the Books of Sederunt; and have Rescinded, and hereby Rescinds all prior Acts of Sederunt that may derogate from the same.

> ACT concerning Decreets of Adjudication. February 26. 1684.

THE Lords of Council and Session considering, That by the Nine-teenth Act of the Third Session of His Majesty's Second Parliament, concerning Adjudications, it is Statute and Ordained, That in place of Comprisings, the Lords of Session, upon Processes rais'd before them, at the instance of any Creditor against his Debitor, shall Adjudge and Decern to the Creditor, in Satisfaction of his Debt, such part of the Debitor's Estate, consisting in Lands and other Rights, which were in use to be Apprised, as

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of the Lords of Session

fhall be worth the Principal Sum and Annualrent then resting to the Creditor, and a fifth part more, besides the Composition to the Superior, and Expenses of the Infeftment. Likeas, by the said Act it is provided and declared, That in case the Debitor shall abstract the Writes & Evidents of the Lands, and other Rights to be Adjudged, and shall not produce a sufficient Right thereof, and delivere the same, or Transumpts thereof to the Creditor. as the Lords shall judge necessary; and in case he shall not Renounce the Possession of the Lands, and other Rights to be adjudged, and ratisfie the Decreet of Adjudication, in that case it shall be leisome to the Creditor to Adjudge all or any Right belonging to his Debitor, in the same manner, as he might have apprifed the same, conform to the Act of Parliament 1661, Anent the payment of Debts betwixt Debitor and Cre ditor, in all points, under the Reservation, and with the power competent to other Creditors, exprest in the faid Act. And albeit it appears by the forefaid Act of Parliament, that where the Adjudication is special, and proceeds upon Probation of the Rental, and the Debitors Production of the Writes, the Decreet ought to be for the Principal Sum, Annualrents thereof, and a fifth part more without the Penalty of the Bond; But where the Adjudicaution is general, in absence of the Debitor, without Probation of the Rental, the Decreet ought to be for the Principal Sum, Annualrent, and Penalty (If any be) contained in the Bond or other Write, which is the ground of the Adjudication ; yet by Mistake of the Clerks and their Servants, some Decreets of Adjudicaution have been Extracted, adjudging the Debitors whole Lands, in Satisfaction of the principal Sum, Annualrents, Penalty and a fifth part more, and the Lords in some Cases which have occurr'd before them, being unwilling hitherto to annull these Adjudications have restricted the same to the principal Sum, Annualrents and Pena'ty recumulat, contained in the Decreet: in regard the style of the Summons, concluding a fifth part more, hath given occasion to the foresaid Error; but finding it. expedient that the Leidges be in a certainty as to this point for the future, They declare, that if hereafter any Decreets of Ajudication, proceeding without Probation of the Rental, and Adjudging the Debitors Estate in general, without Restriction, shall be Extracted for a sifth part more, they will not sustain and restrict these Decreets of Adjudication, but will find the same Void and Null, as if they had never been pronunced. And to the end the Leidges may be certiorat herein, ordains this Act to be published at the Mercat Cross of Elinburgh. This was occasioned in the Case betwixt Wilson and Home vie'. 17 Febr ary 1684 vid. Newton n Decif. lxxxiv p. 57. vid. likeways Ibid. Decif. vi. p. 3.

His MAJESTY'S Warrand, exceming the Lords of Session from payment of Taxes.

November 19. 1684.

HIS day the Lords ordained a Letter from His Majesty to the Lord High Thesaurer, and Thesaurer-deput, containing a Warrand, discharging the uplifting of Taxes or Supplies from the saids Lords or their Successors, to be Recorded in the Books of Sederunt; of which Letter the Tenor follows,

CHARLES R.

I Ight Trufty, and Right well beloved Coufin and Counfellor, and Right Trusty and well beloved Counsellor, We greet you well. Whereas out of a regard to what is earnestly recommended to Us in the Third Act of Our current Parliament, of that Our Ancient Kingdom, We did, by Our Letter of the 30 day of December last by-past, discharge you from granting Exemptions to the Lords of Session, and some other Persons, from paying their proportions of the Taxations and Supplies, at several times granted unto Us by Our Parliament and Convention of Estates of that Our Kingdom, yet finding by a Letter to Us from the Lords of Session, bearing date at Edinburgh, the twenty third of February last, that their Immunity and Exemption from payment of all Taxes, Contributiones, and other extraordinary Charges were secured unto them, by the Law of the Kingdom, at the first Institution of the Colledge of Justice, by the Sixty eight Act of the Fifth Parliament of King James V. and that this Priviledge and Immunity hath been fully Ratified and Approven, by all Our Royal Predeceffors since that time, in most Parliaments; and lastly, by Our Royal Self, in the eight Ast of the second Session of Our second Parliament, which states them in a different case from others, to whom We were Graciously pleased, out of Our Royal Bounty, to grant Exemptions from publick Burdens; We have now thought fit to let you know, That in Consideration of the Premisses, and of their Eminent Services to Us, and that Our Kingdom, We are Resolved, That their said Immunity and Exemption shall be for the future, asit hath been formerly continued unto them, as being their Right established by Law; And therefore we do hereby Prohibite and Difcharge you and your Successors in Office, from suffering any Taxes, Sup-

plies.

plies, Contributions, or other extraordinary Charges, to be uplifted or called for from any of the saids Lords of Session, or their Successors in that Court, notwithstanding of any Orders formerly granted by Us (particular-Iv in Our said Letter, of the Thirteenth of December last) to the contrary; Providing nevertheless, as it is Our express Will and Pleasure, that no other Person or Persons whatsoever be freed from any such Taxation, but that on the contrary, they be indispensibly lyable to the payment of their proportionable shares of all Taxarions, Supplies, and other publick Burdens imposed, or to be imposed by Our Parliaments, or Convention of Estates, upon the rest of Our Subjects of that Our Kingdom, conform to the Intent and Meaning of the faid third Act of Our Current Parliament; For all which this shall be to you, and all others who may be therein respectively concerned, a sufficient Warrand: And so We bid you heartily Farewell. Given at Our Court at Whitehall the fifth day of April 1682. And of Our Reign, the 25th. Year. Subscribed thus by His Majesty's Command, Morray. VVhich Letter is directed on the Back thus, To Our right trusty and right well beloved Coufin and Counfellor, and Our right trufty and well beloved Counsellor, William Marquels of Queensberry, Our Thesaurer principal, and John Drummond of Lundee, Our Thesaurer Deput of Our Antient Kingdom of Scotland.

ACT, Discharging the Printing of Informations.

January 2. 1685.

The Lords of Council and Session, upon divers good Considerations, Do Prohibit and Discharge Printing of any Informations, or other Papers relating to Processes intented before them, or any Interlocutors, Acts or Decreets in these Processes; and Discharges all Printers within this Kingdom to receive in any of these Informations, or other Papers abovementioned, to be Printed, without an express Warrand from the saids Lords.

WARRAND for Registrating Dispositions of Bankrupts Lands in the Books of Session. January 10. 1685.

He which day the Lords ordained the Dispositions to be made of Bankrupts Lands, by these having Commission from them to sell the same, conform to the 17th Act of his Majesty's 3d Parliament,

th ordinary Clerks of the Session, and appoints a separat Register-Book to be kept in each one of the Clerks Chambers, wherein these Dispositions may be Recorded, with a Minut-Book relating thereto.

ACT relating to the Sale of Bankrupts Lands.

March 13. 1685.

Orasmuch as upon a report made this day to the Lords of Council and Session, by one of their number, of two Dispositions of Sale of Bankrupts Lands granted conform to the Order and Method preicribed by the late Act of Parliament, in the Year 1631. That point did occur to be confidered by them, concerning the obligement of Warrandice in the Difpolitions to be granted by Creditors of their Rights to the Purchaser: For clearing whereof, the Lords do Declare, that the Creditors who are prefered to the price of the Lands upon payment, shall be holden to Dispone their Rights and Diligences used at their Instances, in favours of the Purchaser, with Warrandice quoad the Sums received by them; so that in case of Eviction of the Lands Disponed, they shall be lyable to refound these Sums in whole, or in part, effeiring to the Eviction, and the Sums payed to them, with the Annual-Rent thereof, only from the time of the Sentence; providing always Intimation be made to the faids Creditors of the Process for Eviction, before Litis-contestation in the Cause; and the Lords Declare this to be the import of any former obligements of Warrandice given by, Creditors in the case forelaid.

ACT in favours of the Under Clerks, aneut the payment of their Dues of where Commissions are granted.

November 17. 1685.

HE which day, anent a Petition given in to the Lords of Council and Session, by the Under-Clerks of the Session, mentioning, that where the greatest part of all their Trouble and Pains, in Processes wherein they are Clerks, is in these that comes the length of Lits-contestation, and Pro-, bation led therein; and after several Debates, writing of Minuts, Extending of Scrolls, again and again; all the benefit they can expect for their pain

of the Lords of Session

is y payment for the Depolitions of Parties and Witnesses, conform to the Act of Parliament: But when the Lords grants Commission (as is now very frequent) to examine Parties and Witnesses in the Country, the Petitioners get nothing, and are thereby frustrat of all the payment which they expected, and used, to get for their Pains: And therefore craving. that the Lords would allow the Petitioners the half of the ordinary Dues. whereParties and Witnesses are Examined by Commission: whereby they will be encouraged to ferve the Lords and the Leidges more chearfully. Which Petition being considered by the saids Lords, They Found the defire thereof just and reasonable, and do Ordain, that in time coming, when Commissions shall be granted by them, for Examining of Parties or Witnesses, that the Under Clerks shall have the half of the ordinary Dues which are payed to them, where Parties and Witneffes do Compear before the Lords, and Depone, viz. A Merk for each Party, and half a Merk for each Wienes Examined by Commission, to be payed at the return of the Report and Commission, before an Avij andum be put up in the Minut-Book. And ordains these presents to be insert in the Books of Sederunt.

ACT Concerning Process of Cessio Bonorum.

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December 1. 1685.

He Lords of Council and Session taking to their Consideration the abuses which have farely creept in, by the Claudestine calling and carrying on of Processes of Bonorum in the Outer-House, whereby the same comes not timeoully to the knowledge of the Creditors concerned, that they may be heard; and that several persons have procured Decreets of Bonorum, who in Law ought not to have the same: For remeid whereof, the Lords do Ordain, that in time coming, after a Summons of Ceffio Bonorum shall be called by the Clerks in the Outer-House, albeit there be no Comperance at the calling for any of the Creditors, yet the Process shall be Enrolled in the next Weeks Roll for the Outter House, and a Roll of the names of all the Creditors conveened in that Process affixed on the Wall of the Outer-Houle, and Ordains, that in the Summonds, there be specially Libelled the occasion and way how the Pursuer came to be tapsus Bonis, and that he adduce Probation, or produce sufficient Instructions or Evidences of the same in the Process: And ordains this Act to be insert in the Acts of Sederunt.

ACT Declaring the Clerk of the Bills lyable for the Parties Damnage where he refuses a sufficient Cautioner.

February 18. 1686.

HE Lords of Council and Session, considering that Parties may be prejudged, not only by the Clerk of the Bills, his receiving of infolvent Cautioners, but also by his retusing of Cautioners, who are sufficient; therefore they Declare, that the Clerk of the Bills shall be lyable for the Parties Damnages, als well where he resules a Cautioner who is Sufficient, or is holden and repute to be sufficient, as where he receives an insufficient Cautioner.

A.C.T Concerning the Order of the Lords going to the Side-Bar, and Reports 2.

November 4. 1686.

HE Lords of Council and Sellion, for avoiding Confusion at the Side-bar, do Ordain, that only two Lords in one Day, (beside the Ordinary on the Bills) shall go to the Side-Bar to call Processes, and One of them only at one time, and that in the Order following, Viz. First, These Two, who were Ordinaries in the Outer-House, the two weeks immediatly preceeding, and the next day, these two, who were immediatly before them. and so forth the rest of the Lords, and that there be no exchanges of days among the Lords. And the Clerks are discharged to write any Minuts in any Process called at the Side-bar, contrair to the Order and Regulation abovementioned, upon pain of Deprivation; And likewise, That the Lord who was Ordinary in the Outer-house, the immediat preceeding week, and no other, without his allowance shall go out to the Bench, in the Outerhouse, and from Nine a Clock, until the Ordinary come out, call any Process, wherein he had formerly pronunced A&, Decreet, Protestation, or Interlocutor; and upon Application of any of the Parties, shall find cause to hear the same again; providing always the party Apply within the space of a Week, after the pronuncing of the At, Decreet, Protestation, or Interlocutor, after which time, the Lords discharges the Calling or Hearing of the same, either upon the Bench, or at the Side-bar, but leaves the parties

of the Lords of Session.

to feek Remeed by Suspension, or Reduction, as accords. And to the effect the Parties and their Procurators may know the particular Days of the respective Ordinaries weekly, They ordain the Keeper of the Rolls for the Outer-House to affix upon the Wall each Munday weekly, the particular Days, and Names of fuch Lords as are to be Ordinaries at the Side Bar the Week following. And the Lords Discharges the Clerks in the Inner-House to read any Petitions, in relation to any Interlocutors pronunced in the Outer House, except the Petition bear, That the Party had applyed to the Ordinary, whom he shall name, and that He had refused to give them the Lords Anfwer, upon an amound, conform to the late Act of Parliament, anent theRegulations; And the Lordsordain, that in time coming, only two Lords in one Day Report Causes, and that they do the same, as they stand in Order, in the Squadrons. And that the Keeper of the Roll for the Outer-House affix upon the wall each Munday, the Names of the Lords who are to Report Caules that Week, and the particular days whereon they are to Report 3 And ordain, That the Informations to be given to the Lords shall mention on the back thereof, by what Lord the Cause is to be Reported.

Order concerning Gratis Warrands.

November 20 1686.

THE Lords of Council and Session do ordain, That any Petitions which shall be given in hereaster, by Persons craving the Benesite of the Poors Poll, shall condescend upon the Process wherein they are Pursuers or Desenders, upon account whereof, they desire that Benesite, and that the Warrand for En-Rolling them amongst the Poor shall be Restricted to these Processes allenarly, and the Warrand to continue only for three Years, unless the same be renewed.

ACT anent the ordering of the Inner-House,

December 16 1686

THE Lords of Council and Session considering, That by the Ancient Custom, no persons of whatsoever Quality, were permitted to come within the Bar of the Inner-House, during the time of Debateing Causes, except

cept His Majesty's Advocat, the Clerks of Session, the Clerk of the Bills, and his Deput, and one Macer, they do Revive that Custom, and Ordain the same to be duly observed in time coming, discharging hereby the Macers to permit any Persons, except those above express, to come within the said Bar, as they will be answerable on their perril. And in case any Person be desirous to speak with any of the Lords, while they are upon the Bench, that he call for a Macer at the Door, and give notice thereof by him; It is always hereby Declared, that the Lord Thesaurer, and Thesaurer Deput, or the Commissioners of his Majesties Thesaury, not being of the Bench, shall be allowed to be within the Bar, when the King's Causes are called and Debated, and no otherways.

ACT Impowering the Magistrats of Edinburgh to impose a Stent of 500 2 pounds Sterling yearly, for cleansing the Town for Three years,

January 29, 1687,

HE Lords of Council and Session considering, that by an Act of the last Parliament, the Magistrats of Edinburgh are ordained to lay down effectual ways, for preserving the Town, Canongate and Suburbs, from Nastiness, and freeing the same of Beggars, which repair in and about the Burgh, under the Pains and Certifications therein exprest; And the Lords of Session are, by the said Act, appointed to meet with the Magistrats, and to receive from them rational Proposals to that effect, who are likewise Authorized with consent of the Magistrats, to impose such Taxes upon the Inhabitants, Burgesses and others as they shall find just and necesfary, for cleanling the Town, and in purluance of the faid Act of Parliament. The Lords of Session having several times met with the Magistrats, and at last resolved, and condeicended upon a method of cleansing the Town of Edinburgh, Canongate and Suburbs, from filth and Nastiness, and of purging and freeing the same of Beggars, repairing in and about the said Burgh. as is more fully exprest, and Insert in the Arricles under the hand of Sir Alexander Gibson, one of their Clerks. And the saids Lords being convinced. that for the effectual Performance thereof, it will at first, require some confiderable Expence to be deburfed, for that end; Therefore the Lords of council and Session, conform to the Power granted to them, by the said Act of Parliament; and for the Magistrats, their Enconragement to perform the fame effectualy, Do, with Content of the Migistrats, Authorize and Im-

power

Sentence in Favours of the Members of the College of Justice, against the Town of Edinburgh.

February 23. 1687.

He Lords of Council and Session having considered the Sum nons of Decl r tor, raised at the Instance of the Members of the College

of Justice, of their Privileges against the Town of Edinburgh; The Sulpension raised by them of the Charges given at the Instance of the Town. for payment of the Annuitie, and the Bill of Suspension given in of the Charges for their Proportions of his Majesties Supply, the Answers made thereto for the Town, and whole Disput proponed for either Party, with the Acts of Parliament, and other Acts and Writs founded on hine inde in the Debate; They fustain the foresaid Declarator, as to the Members of the College of Justice, their Immunitie and Exemption from payment of the Annuitie for the Ministers Stipends; And Decemb and Declares them free thereof, both as to bygones and in time coming, and Suspends the Letters simpliciter for the same; and likeways sustains the Declarator, as to their Immunitie from Watching and Warding, and any Impolitions for the lame. and from payment of any Customs, Calley-mails, Shore-dues and other Impositions, laid on their Provisions of Meat and Drink for their Families, and their other Goods carried to, or from the Town, and collected at the Ports or other places within the Liberties of the Town; And Declares, that the Producing a Certificate subscribed by a Member of the College of Justice. bearing that the Goods or Provisions do properly belong to him, shall be fufficient for freeing them from payment of the faid Customs and Impositions, the Certificat being renewed once in the half year at least; And Sustains the Declarator, as to the Pursuers Exemption from the Civil Jurisdiction of the Magistrats of Edinburgh, and Declares, that upon their proponing Declinator thereof, the Magistrats ought to desist from any Procedor against them without necessity of Advocation, and before answer as to the Criminal Turisdiction, and to that Point of the Declarator concerning the Purfuers Imploying Un-freemen within the Town. the Lords Declare they will take Tryal what has been the former Custom as to both these points. and particularly what was done in the cases mentioned in the Debate; And the Lords Ordain, that where a Taxation or Cess is imposed by Acts of Parliament, or Convention of Estates; To which the Members of the College of lustice are or shall be lyable, that there be a special and distinct Stent made upon the Town and Suburbs for the Quota imposed, and so much more only as may defray the incident Charges of Collecting the same, wherein no Exemption shall be given to the Magistrats, Stent-masters or other persons, but that they be Stented for their Proportions of these Impositions as well as other Inhabitants, and likeways, that the Tenements belonging to Trades be Stented, and the Towns Common Good, where the same confifts in Land or Few-duties, and doth not bear Burthen with the Shire; but

of the Lords of Sellion.

but prejudice to the Town of Edinburgh, if they think fit to lay on the Proportions of these who have been in use to be exempted upon their own Neighbours, but not upon any Members of the College of Inflice; And to the end these Impositions warranted by publick Authority may be equaly laid on, and these of the College of Justice, who are Heretors not burdened beyond their just Proportions, The Lords Declare, that they will from time to time Nominat one Advocat, and one Writer to the Signet, for each Quarter of the Town, to meet with the Stent-masters, who shall be appointed by the Magistrats, at their taking of the Survey, and Valuation of the whole Tenements within the Burgh and Suburbs, and of the Trade of the Burgesses which is in use to be Stented, and to bear a part of the Burthen of the Cels, and to be present at all their Meetings for imposing of the Stent. and to see that the Valuation be justly and equally made, and the Stens laid on accordingly, and for that effect, appoints the Magistrats to make Intimation of the time of the Stent-masteas Meeting to the Lord President of the Session, the Dean of Faculty, and the Keeper of the Signet, Ten days before in the time of Session, and Twenty days in the time of Vacance; And Appoints this method of Stenting, to begin and take effect for that Term of His Majesties Supply due and pavable at Martinmass next, 1687. but preindice to the Town of Edinburgh, to use execution for that Terms Supply which was payable at Martinmals last 11686, and the Whitsundays Term now ensuing, according to the Stent already imposed for these two Terms; And the Lords do Declare the persons following to be Members of the College of Justice, who are to enjoy the Privileges abovementioned, viz. The Lords of Session, Advocats, Clerks of Session, the Clerks of the Bills, the Writers to the Signet, the Deputs of the Clerks of the Session, who serve in the Outer House, and their Substitutes for Registrations, being one in each Clerks Office, the Three Deputs of the Clerks of the Bills, the Clerks of Exchequer, the Directors af the Chancellary, their Depute, and two Clerks thereof, the Writer to the Privy Seal, and his Deput; The Clerks of the General Register of Seasings and Hornings, the Macers of the Session, the Keeper of the Minut Book, the Keepers of the Rolls of the Inner and Utter-House. And the Lords do extend the Priviledges foresaid to the persons following, viz. One actual Servant of each Lord of the Session, one Servant of each Advocat, Four Extracters in each of the Three Clerks Offices of the Session, Two Servants employed by the Clerk of Register in keeping the publick Registers, the Keeper of the Session-House, and the keeper of the Advocats Library. It is always hereby Declared, that if any of these Ser-

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Merchand-Shops, Taverns or Ale-Houses, or excercise any other Trade within the Burgh, they shall not enjoy any of the Privileges abovementioned, and ordains these Presents to be Recorded in the Books of Sederunt, and to be Printed.

ACT concerning Decreets conform.

June 22. 1687.

totore observed, wherreby Ministers of the Gospel hath been in use to purchase Decreets conform, upon Decreets of Locality obtained by their Predecessors, is unnecessary, and inconvenient, and chargable to the Ministers: Therefore the saids Lords do declare, that wherea Decreet of Locality is obtained by a Minister for his Stipend, any Succeeding Minister needs not obtain a Decreet conform thereupon; but upon a Bill given in by him to the Clerk of the Bills, in the ordinary way, and production of his Presentation, Collation, and Institution, with the Decreet of Locality obtained by his Predecessor, Letters of Horning may be direct against these lyable in payment of his Stipend; and Declare, that any Execution which shall be used thereupon, shall be valid and sufficient, notwithstanding any former custom or practice to the contrair.

ACT discharging Decreets to be delete in the Minnt-Book, for not payment 4 of the Macers Dues.

June 30. 1687.

HE Lords of Council and Sellion confidering the prejudice the Leiges do sustain, by scoring of Decreets in the Minut-Book, for not payment of the Macers and keeper of the Minut-Book their dues; therefore they discharge any Decreets put up in the Minut-Book, to be scored or delete upon that ground: And ordains the Clerks of the Session, in their respective Offices, to appoint that person who uplists their own dues, also to Collect the dues payable to the Macers and keeper of the Minut-Book for Decreets Extracted in their Chambers, according to the Responde whereof, the said Collector shall be lyable to make due payment to them: And ordains

of the Lords of Sellion.

that the Responde-Book wake mention of the date of the Decreet Extracted

ACT for inferting all the Defenders names in the Minut-Book

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HE Lords of Council and Session considering the prejudice the Leidges do sustain, by the custom used in putting up in the Minut-Book. Decreets obtained by a Party, against several Defenders, expressing only one of their names, and comprehending the rest under the word, and others; Therefore they ordain, that in time coming the keeper of the Minut-Book shall let down therein the Names and Designations of all the Desenders, against whom the Decreet is given; with certification, that if any of their names be omitted, the Decreet as to that person shall be void and null s'excepting Decreets given against Tennents in Poyndings of the Ground, Removings, and for Maills and Duties, wherein it shall be sufficient to mention them to be Tehnents in fuch a Barrony or Tennendry but if any of the Defenders Called, or a third Party Compearing, propone up on his Right, and Decreet be given against him, his name is to be insert in the Minut Book : And the Lords Ordain, that in Process against Debitors. where an Advocat Compears for any of the Defenders, for whom he did not return the Process, that he shall mark with his hand upon the Process, for what person he Compears, and Subscribe the same, conform to the Act of Parliament, and that he be not allowed to propone a Defence for the Party. untill he do the fame.

The formula of the Oath in a Cessio Bonorum.

February 8, 1688.

HE Lords of Council and Session do Ordain, that in Process of Cessio Bonorum, the Pursuer shall give his Oath in the Terms sollowing, viz. It he hath any Lands, Heretages, Sums of Money, Goods or Gear belonging to him, more than is contained in the Disposition, and Inventar produced in Process, if since his imprisonment he hath made any other Disposition than that which is produced; and if he hath made any other before his imprisonment, and if he acknowledge that he hath made

the same, and also that he Depone, it since his Imprisonment he hath put out of his hands any Moneys, Goods or Gear belonging to him: And the Lords do declare, that if the Pursuer shall deny that he hath granted any other Disposition, and that his Oath shall thereafter redargued, the Decreet of Benorum obtained by him, shall be void and null, and he shall never get the benefit of a Celsio Bonorum thereaster.

ACT concerning Oaths in Exhibitions,

Look, Decreeis obtained by a Party, against several Desenders, expressing only one of their names, 18801 1.22 h granded as rash under the word, and

THE Lords of Council and Session considering the inconveniencies to his Majestie's Subjects, by Desenders called in Exhibitions or Incidents, for Exhibition or Production of Writs, their Deponing only in general terms, that they neither have, nor had the Writs since the Citation, or fraudulently have put the same away at any time. Therefore they Ordain, that in all time coming, Parties shall be obliged to answer ro all special pertinent Interrogators, in relation to their having of the Writs, or puting the same away, or as to their knowledge and suspicion, by whom the samine were taken away, or where they presently are, that the Pursuer may thereby make discovery, and recover the same. Declaring always, that upon advising of the Desenders Oaths, they shall not be otherways decerned against, as havers of the saids Writs, unless it be found that they had the same since the Citation, or fraudfully put them away at any time.

ACT concerning Bills of Suspension where the Reason is referred to the 3 Chargers Oath.

February 29. 1688.

THE Lords of Council and Session, considering the prejudice the Leidges do sustain, by Suspensions raised frequently upon calum, mious reasons referred to the Chargers Oath, They Ordain, that in time coming, where Bills of Suspension shall be given in, and the reason offered to be proven by the Chargers Oath, that the Ordinary upon the Bills, If he find the reason relevant, shall take the Oath of the Charger, being present

fent, upon the verity of the reason, in order to the passing or refusing of the Bill of Suspension; and if the Charger be absent, that he take the Suspenders Oath of Calumny, that he hath just reason to propone the Reason of the Suspension; and he Deponing affirmative, or if he be not present to give his Oath, that in either of these cases, the Ordinary pass the Bill, with this Quality, that the Suspender shall be lyable to the Charges and Expences the Charger shall be at through the purchasing of that Suspension, and in discussing of the same, according as he shall depone upon these Expences, without any modification thereof, if the Letters shall be found orderly proceeded.

ACT concerning the trial of Advocats, who enter upon a Bill to the Lords.

July 6. 1688.

and manner of trial, which is at present, and hath been these several years bygon observed, as to such who enter Advocats upon trial, in the ordinary way, viz. By privat and publick Examination, and assigning them the Subject of a publick Lesson; and finding it expedient that some course be taken for regulating the entry of others, who are admitted extraordinarly upon a Bill to the Lords, They Ordain, that in time coming, when any persons shall apply to the Lords, to be entered Advocats, without undergoing the ordinary trial, they shall be examined by the Lords in presentia, concerning their knowledge of the Styles, the form of Process, and of the Principles of our Law, and that the Lords shall be well informed of their integrity and honest deportment, before they be admitted.

ACT for marking the Names of the Witnesses Examined upon the At.

July 7. 1688.

HE Lords Ordains, that the Ordinary who Examines Witnesses, immediatly after the Examination, shall set down upon the Act or Warrand for Examination, the Names of the Witnesses Examined by him, and Subcsribe the same; And the Lords Declares, they will have no regard to the Depositions of these Witnesses, whose names shall not be set down by the Lord Examinator, in manner foresaid:

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The Acts of Sederunt

ACT, anent the Habit of Dyvours.

July 8. 1688.

HE Lords of Council and Selsion do ordain, that in time coming when any Bankrupt shall raise a Process of Cessio Bonorum against his Creditors, that with the Process he produce a Certificat, under the hand of one of the Magistrats of the Burgh where he is Incarcerat, bearing, That he hath been the space of a Month in Prison; without which Certificat; the Process is not to be sustained; and when he shall obtain a Decreet, Ordains the Magistrats of the Burgh, before his Liberation out of Prison, to cause him take on, and wear upon his Head, a Bonnet, partly of a Brown, and partly of a Yellow Colour, with upper-most Hose, or Stokings, on his Legs, half Brown and half Yellow coloured, conform to a Pattern delivered to the Magistrats of Edinburgh, to be keeped in their Tolbooth, and that they cause take the Dyvour to the Marcat Cross, betwixt ten and twelve a Clock in the forenoon, with the forelaid Habit, where he is to fit upon the Dyvour Stone, the space of an hour, and then to be dismissed; and ordains the Dyvour to wear the said habit in all time thereafrer; and in case he be found either wanting, or disguising the same, he shall lose the benefit of the Bongrum; And in case the Magistrats Certificar atoresaid shall be redargued, or that they shall not observe the said" Order, in the Liberation of Dyvours, they shall be lyable in the Debt, for which the Dyvour is Incarcerat; And the Lords Declares, they will obferve this Act in time coming; and will not dispense with the foresaid Habit, except in cases of Innocent misfortune, liquidly Libelled and Proven. And appoints this Act to be Printed, and the Agent for the Royal-Burrows, so transmit a Printed Copy thereof to the Magistrats of each Burgh.

ACT, anent Notars.

THE Lords Ordains, that the Ordinary who Exemines Witreffes, jumediatly after the Exemples acide, viet down upon the Act or

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tars to subscribe Writs for persons, who cannot write themselves, unless it either consist in the Notar's knowledge, that he for whom, and at whose command they subscribe, is the person designed in the Writ,

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an pa or that the same be attested by these who Subscribe Witnesses to the Notars Subscription, or by other credible persons, and which the Notar is to mention, when he Subscribes for the Party. And to the end, that this Act may be known to all his Majestie's Leidges, Ordains the same to be Printed.

ACT anent the Calling of Transferrings.

July 26. 1688.

HE Lords of Council and Session do Declare, that Summons of Transferring being seen and returned, may be called before the Ordinar, in the Outter house, and that he may proceed therein, albeit the same be not Enrolled.

ACT concerning Summons of Wakening. November 6. 1689.

HE Lords of Council and Session confidering, the Expence that must arise by Summons of Wakning of the whole Processes depending before the Lords, and the Executions thereof through all the corners of the Kingdom, if the ordinary form of Waknings were necessary to be observed in this extraordinary Case, and withal confidering that the Lords in extraordinary cases, have allowed Edictal Citations at the Marcat-Crosses; Do therefore for the ease of the Liedges appoint the keeper of the Signet to exped three Summons of Wakening for each Shire of the Kingdom, leaving a large Blank for inferring Processes therein, and do hereby ordain the Sheriff Clerk of each Shire, and the Clerks of the Stewartries of Kircudbright and Orkitat and in case of their absence or neglect, the Town Clerks of the Head-Burghs of the Saids Shires, and Stewartries, to infert all Processes whereof he shall receive a Note before the second Mercatday after the faids Blank Summons comes; to his Hand, and that he cause Cite all Persons and Parties residing within the Shire or Stewartrie upon fix days, to appear before the Lords, for Wakening the faids Processes, and that he cause read the said Summons publickly at the Marcat-Cross, betwixt ten and twelve on the faid Mercat-day, after three several O Yesses, and that he affix a Gopy of the faids Summons, so filled up, upon the Cross, and that he return the faid Summons, with Executions feveral, and particular, for each Process intert therein, with all-possible diligence to one ot-

of the principal Clerks of Session, and that he make the like Citation upon the fecond Blank Summons fent to him upon the next Mercat-day in manner foresaid, tor all the Processes whereof he shal received Note for the second before the faid Mercat-day; And that he do the like on the next Mercat-day thereafter, asto the third Summous sent to him, and that he cause the Executor, fign all the several Executions. with the Witnesses that he Imploys therein respective; Providing always, that he receive six Shilling Scots with each Note of the Processes to be insert as asoresaid, for doing the Duties above-written, and for returning the Processes to the Clerk, It is hereby Declared, that this is without prejudice to any Party that pleases to make use of Waknings in the ordinary form, & that it is only to be extended to such Processes, as were not sleeping the first of November 1688. and since that time have not been called through the Surcease of Justice. and that there is no necessity to Waken coucluded causes; (the same having never been in use to be Wakened) which the Lords will advise, and proceed in according to the Books of Enrolment : Likeas, the Lords appoint the Pursuers, to have Benefit by this Order, to have their several Executions delivered to them by the Clerks of the Session, and appoints them to present Coppies of the faid general Summons, to be formed by the Writers, and pass the Signet, as is useual in taking Summons of the Signet; And it is hereby Declared, that where Summons were formerly execute for the first Dyet. and the fecond Citation not given, that in that Case a new Summons may be raised in Name of their Majestie's King William and Queen Mary, which shall suffice in place of a second Citation, and if the Summons have been execute for both Dyets, but not called, that the same may be Wakened in the fame manner, as is appointed by this Act for Summons, which have been called. And ordains this Act to be Printed and published by Macers or Messengers at Arms, at the Mercat-Cross of Edinburgh, and Appoints the several Sheriff Clerks to cause publish the same at the Mercat-Cross of the Head Burgh of the Shire upon the next Mercat-day after the fame shall come to their hands, betwixt Ten and Twelve a Clock in the forenoon.

ACT concerning Declinators proponed against the Ordinary in ebe Outter-House. 2. December 14. 1689.

HE Lords of Council and Session confidering, that sometimes Declinators are proposed against the Ordinary in the Outer House, and it being no ways Just, that the Party on that Occasion should sustain?

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prejudice by delay of the Process; Therefore, the Lords do Declare, that when the Ordinary in the Outter-House shall be declined upon relevant Grounds in Law; or that the Ordinary shall decline himself, that upon defire of the Ordinary, or application of the Party, They will Nominat and Appoint an other of their Number to call and discuss that Process in that fame Week.

Additional ACT concerning the Order of the side Barr, and reporting of of the Competitors, until a Decisolus preference, ranking the whole Creditors, be dorained; untels there appear a clear Fond, cut of which the

Led to red o a January 16. 1690.

HE Lords of Council and Selsion, Do renew the Act of Sederunt of the fourth of November, 1686, anent the Order of the Lords going to the Side-Barr, and reporting of Causes, and Ordains the same to be duely observed in time comeing, with the Additions following, viz. That the first named in the Roll of the two Ordinaries for the Side-Barr. shall go out betwixt Ten and Eleven, and the other betwixt Eleven and Twelve a Clock; And where any Act, Decreet, or Protestation being pronounced without Debate in the Cause, is thereafter stopped upon Application of one of the Parties, that the same is not to be called at the Side-Barr. but upon the Bench in the Outter-House, before the Ordinarie come out the next week at furthest after pronuncing thereof; And whereas it is Ordained by the faid Act, that only two Lords in one day shall report Causes. The Lords Declares, that the Ordinary in the Outter-House, and the Ordinary on the Bills, are not thereby debarred from reporting, they being understood to be Supernumerary; And Ordains the foresaid Act of Sederunt, with thir additions thereto, to be affixed on the Wall of the Outter-Houle.

ACT, concerning Aliments and Factors being lyable for Annual-Rent.

The last of July, 1690.

HE Lords of Councill and Session taking to their Consideration, That they are trequently importuned by Parties having Actions depending before them, who apply to have Sums modified for their Aliment, during the dependence of these Actions; albeit it be doubtfull, if

there will be any free superplus due to them, which might be a ground for fuch a Modification; Therefore the faids Lords Declare, That in time comeing they will grant no Aliment to Parties upon the account of Actions they have depending before them, unless it appear that there will be a free superplus Sum uncontrovertedly belonging to these persons, at the event of the Process, in consideration whereof a Sum may be modified in the mean time. for their present Aliment and Subsistence; and in case of Competion anent the Rents of Lands, upon real Rights, that no Aliment shall be given to any of the Competitors, untilt a Decreer of preference, ranking the whole Creditors, be obtained; unless there appear a clear Ford, out of which the Aliment may be granted, without prejudice of any other of the Compettors. Lykeas it is further Declared, That where there is a Sequestration of Rents, and a Factor named by the Lords, that the Factor shall be lyable for Annual Rent of what Rents he shall recover, or by diligence might have recovered within a Year after the same are due, in respect the Factor cannot fafely pay to any of the Competitors, until the preference be concluded; And in like mariner, that no Aliment shall be granted to Debitors, or perfons having Right to a Reversion, or to the Property after the Distresses are purged; unless it be evident, that there is a superplus Rent over and above all the Annual Rents of the persons Competing. rion of one of the Parries, that the lameis not to be called at the Side-Barr,

ACT for keeping the Innermost Barr of the Outter-House, and

ed by the laid All, that 0.0001 . 3 radmayo' de day hall report Canles.

The Lord's Declares, that the Ordinary in the Outter-House, and the Ordi-HE Lords of Council and Sellion, Considering the inconveniency of the peoples crowding within the Innermost Barr of the Outter-House, where the Under Clerks, and the Keeper of the Minut Book stay, and the hazard that may ensue therefrom, of abstracting Processes and Papers; They prohibit and Discharge any Persons to enter, or stay within the said Barr, excepting his Majesties Advocat and Sollicitor, and one Servant to be appointed by the Advocat, and Ordains the Little Door pearest the Bench, on the West-side thereof to be immediatly closed up. And the Lords requires the Macers to exact from each person, who shall be found within the faid Barr, half a Dollar toties qualies, to be put in the Poors Box's and in case the Party do not pay the same immediatly, that the y commit him to Prison. And the Lords Declares, That if the Macers shall spare any person, in not exacting the said Fine, that they shall be lyable therein themselves. ACT

ACT concerning the stopping of Decreets, and hearing the Canse thereafter.

November 7. 1690.

HE Lords of Council and Session do Ordain their Act of Sederunt, of the fourth of November 1686. with the Additions and Alterations thereof, by their Act of the 16th of January last, to be exactly observed, and to be affixed upon the Wall of the Outter-House, with the additions following, Towit, That the giving stops to Acts, Decreets, Protestations, or Interlocutors, within fix days after pronouncing thereof, is not to hinder the Extracts of the same, after they are read in the Minut-Book; But one the contrair, Ordains the Clerks to give Extracts as they shall be demand ed, with all diligence, as they will be answerable; But only in case the Parties do not infift to obtain Extracts within twenty four hours after they are read in the Minut-Book. And further, in case Extracts be not insifted for, and obtained of the foresaid Sentences, wherein Parties have been heard upon the Bench, The Lords do further Declare, That no stop shall be granted, if the same shall not be obtained within six days after the date of the sentence, craved to be stopped, and that no further time shall be granted, but the first Dyet that falls to the Granter of the stop, to be at the Side-Barr, in manner above-written. And it is further Declared, That no stop shall be Granted, unless he who craves the same, give in to the pronoun. cer of the Sentence craved to be stopped in write, the particular Points he desires to be heard upon, and that Ordinar may reject the same, unless he find a relevant Ground therein; And if thereupon he stop, that he shall give the other Farty the said Condescendence to see, that both Parties may be ready at Calling, that time be not spent with unnecessar altercations at the Side Barr. AndOrdains an Amaund to be given in to the Ordinary, with the said Condescendence, to be put in the Poors Box, in case the Process or Interlocutor therein be found to have been difingenuously represented in the Condescendence: And the Lords do Prohibite and Discharge any Servants of the Lords of Session, to Agent in Processes, or to deliver informations to the Lords, except in their Masters own proper Causes, or where they are concerned themselves as Parties, And likeways Discharges the Clerks Servants to Agent in Processes, or to deliver Informations to the Lords except in their Misters proper Causes, or their own, with Certification if they transgress, they shall be extruded the House, and surther punished as the Lords shall see cause. ORDER

ORDER for Printing the Act against Solicitation, and Observing of the same

November 11, 1690.

THE Lords of Council and Session do Ordain their Acts of Sederunt, of the 6th of November, 1677, and the 24th of December 1679, against Solicitation, to be Printed, and Assisted on the Wall of the Outter-House, and Ordains these Acts to be observed in all points. Likeas, the present Lords have engaged upon their Honour, to observe the same: and ordains that each Session the Lords shall renew that Engagment. This Subscribed by the Lords at Sederunt.

ACT concerning the manner of delivering Informations to the Lords.

no for all simulation November 29. 1690.

HE Lords of Council and Seffion taking to their ferious confideration the great inconveniency of Solicitation, which creats diffidence in these who have not acquaintance or friends to recommend them, that they are not equally stated, and puts them to a necessity to go to every Lords Lodging, imagining that if they do not, that he may think he is either defpiled, or distrusted, which is a slavery upon the Leidges, upon the Lords, and upon the Lawyers, who are frequently urged by their Clients to goe with them, or for them to solicite the Lords: Therefore to prevent so evil a custom, which is contrary to several Acts of Sederunt, and contrary to the practice of the most civil Nations abroad, The Lords have renewed and enlarged the Acts of Sederunt against Solicitation; And because they find the chief occasion of Solicitation, is the pretence that the Leidges think they are not secure that the Lords get their Informations, unless they deliver them in their own hands, and thereupon take occasion to solicite; for preventing whereof, and for eafing the Leidges, themselves, and the Lawyers, They, according to the example of the most famous Judicatories abroad have appointed Boxes for every one of the Lords, to stand on a Bank in the Session-House from three a-Clock till seven a-Clock at night, each Box having a slit, in which the Informations or Bills may be let in, and cannot be drawn out, untill the Box be opened; the Key whereof is to be kept

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by every Judge himself, and to be committed to no other; and each Lord is to fend for his Box, at feven a-Clock at night, that he may have competent time to peruse all the Informations therein, and to consider the fame, and the Citations alledged in the same, whereby none of the Leidges can be put to trouble to attend any of the Lords, for giving their Informations, Bills or answers. Therefore the Lords do Declare, that they will receive no Informations, Bills, or Answers, in any other way, and that the receiving the same any other way, shall be holden as Solicitation, except these Lords who are to report, who may receive the Informations of the Parties, being delivered to the Clerk of the Process, and by the Clerk, with the Process, to the Reporter. And because Parties do frequently forbear to give their Informations, through negligence, or of purpose to see their Adversaries Informations, before they make their own: And likewise, the Lords sometimes are not ready to report, when they have received Informations, whereby the rest of the Lords are uncertain what will be reported every day, and are necessitated to read much more than they needed: Therefore it is appointed, that every Reporter shall before feven a Clock at night, put a note in each Box, of the Parties, whose Processhe is to Report the next day.

ACT concerning the time of Signing Interloquitors by the Ordinary

December 13, 1690.

that do fall out through the delay of Signing Interloquitors by the Ordinary, after the same are prondunced; therefore they Ordain, that in time coming, where any Act, Dectee to Protestation is pronounced by the Ordinary in the Outter-House in absence, the Warrand thereof shall be Signed by him before he go off the Bench; and where any Interloquitor is pronounced by the Ordinary in the Outter-House upon Debate, that the same shall be presented to him, to be Signed that day whereon the Interloquitor is pronounced, or the uext day thereafter, except these pronounced upon Friday and Satunday, which are to be Signed at furthest upon the Munday thereafter, otherwise that the same shall not be Signed, but the Process shall be entered again in the Book of Enrolment. And the Lords Declares that they will attend from six to seven a Clock at night, for signing the saids Interioquitors. Likeas, the saids bords do Ordain, that where a Cause is

taken by the Ordinary in the Outter-House to Interloquitor, to be reported to the whole Lords, the Process shall be brought to the Ordinary, as follows, viz. The Process taken to Interloquitor upon Tuesday, to be brought to the Ordinary upon Wednesday, to be reported upon Thursday; and these taken to Interloquitor on Wednesday, to be brought to the Ordinary on Thursday, to be reported on Friday; and the Process taken to Interloquitor on Thursday, Friday and Saturnday, to be brought to the Ordinary on Manday thereafter, to be reported on Tuesday or Wednesday following; with certification, that it the same be not done, the Process shall go to the Roll again.

ACT Ordaining Processes to be delete, where the Pursuer does not infist.

December 20. 1690.

HE Lords Ordains that where Causes are called in the Roll of the Outrer-House, and the Pursuer's Procurators do not insist, that the Process shall be delete out of the Roll, and not continued to the next Weeks Roll.

ACT anent the Collecting of the Macers Dues for Decreets.

December 31, 1690.

HE Lords of Council and Seffion confidering, that by the way now used of receiving the Macers and Keeper of the Minut-Pook their Dues for Decreets, by the Clerks Servants, who Extract the same. the Macers are sometimes frustrat and delayed in payment thereof; Therefore the Lords do Ordain the Keeper of the Minut-Book in time coming, to Collect the Dues payable to the Macers and himself for Decreets, and to make payment thereof to them, as they shall require the same; and Prohibits and Discharges any. Decreets to be: Extracted after the fixth of January next, untill a Certificat be produced to the Clerks Servant, Extracter of the Decreet, under the hand of the Keeper of the Minut-Book, bearing the Macers dues for that Decreet to be payed to him: with Certification, that the Extracter who shall contraveen, shall be extruded out of the Chamber. and otherways punished as the Lords shall think sit: And for that effect, that the Clerks make their Responde-Books patent to the Macers, and Keeper-ORDER of the Minut-Book

ORDER concerning the time of putting Informations in the Boxes.

June 2. 1691.

HE Lords of Council and Session do Ordain their Act of the Twenty-ninth of November, 1690. Annent the manner of delivering Informations, to be duly observed, with this alteration, That whereas by the Act, the Boxes, wherein the Informations are to be put, are appointed to stand in the Session-House from Three to seven a Clock at night The Lords Ordains, that for this Session the Boxes shall only remain in the Session house until Six a Clock, and that then the same be taken away, that the Lords may have competent time to peruse their Informations.

ACT appointing a List to be affixed on the Wall, of Causes to be called at the Side Barr.

June 10.1691. Les Orices 1.1691. 19 June 10.1691.

he falls in course to be Ordinary at the Side-Barr, shall the day preceeding, before Three a Clock in the Afternoon, cause affix upon the Wall of the Outter House, a Note or List of the Causes to be called by him the next day, to the effect the Advocats for the Parties concerned in these Causes may be in readiness to Debate at Calling thereof; and appoints the like to be done by the Lord who goes out, and calls on the Bench in the Outter-House (before the Ordinary come out) any Process wherein he hath pronounced Ad, Decreet, or Protestation without Debate, and thereafter stopped by him, or referred to him by the Lords. And it is hereby Declared, that the Advocats shall not be obliged to Debate in any Process which shall not be contained in the foresaid Note.

ACT allowing the Ordinary for the Outter-House, to call Causes on the Bench the Week after he is Ordinary.

July 7. 1691.

HE Lords of Council and Session do Declare, that to prevent the confusions at the Side-Bar, the Ordinary in the Outter-House, after his Week is ended, will sit in the Outter-House the Week immediatly

following, half an hour before the Selsion-Bell Ring, till the Ordinary in that Week come out, that he may hear Parties upon any Alledgiance, for altering any Sentence or Interloquitor given by him in his Week, Provided that the Alledgiance be delivered in Writ to him, if he find it just or doubtfull, and will form a Roll of such Alledgiances, and send the samen to the Clerks, that these concerned may take a Copy thereof, and be in readiness, and that he will stop nor alterno Interloquitor nor Sentence otherwise. And the Lords Declares, that they will Meet during this Session at half nine a Clock.

ACT Ordaining Letters under the Signet, to be Subscribed at the Jungure of the Sheets. July 8, 1691.

HE Lords of Council and Selsion do Ordain, that in time coming all Letters confifting of moe Sheets than one, which pass the Signet, as well Suspensions as others, (excepting only Summons) be Subscribed by the Writers to the Signet upon the Margine, at the Junque of the Sheets, in the same manner as is done by the Clerks of Session in Extracts passing their Offices.

ADDITION to the Formula of the Oath in a Cessio Bonorum.

HE Lords of Council and Session, do Ordain the Act prescribing the Formula of the Pursuers Oath in a Process of Cesso Bonorum, to be observed with this Addition to the Formula, viz. That the PursuerDepone if he hath cancelled or put out of his hands any Whritis since his Imprisonment, and it he acknowledge the same, that her condescribed or described by the same of the same o

ACT concerning the total of Notars - 1911 of Solars - 191

HE hards of Council and Selsion, confidering the inconveniencies that do ensue from the ignorance and informality of Notars, which occasions many Pleys; They Ordain, that in time coming no person be adinitted Notar, unless a Petition be given in to the whole Lords in presentia, with a Certifican under the Hands of persons of Credic, attesting the Petitioner to be a Person of good Fame, and that he hath had good Breeding, for qualifying him to exerce the Trust of a Publick Notar; and that exact Tryal be taken by the Ordinary on the Bills for the time, and any other of the Lords to be appointed by them (being both met together) of the Persons Knowledge and Qualifications, conform to the Acts of Parliament which are in Vigour, before he be admitted Notar.

FINIS.

THE PARTY OF

ACTS SEDERUNT.

From the first day of November 1691, to the first day of November 1696.

A CT, for the effectual payment of the Secretaries Dues, where Reasons of Suspension or Advocation are Discussed upon the Bill.

November 11th. 1691.

HE Lords of Council and Session having considered the Acts of Sederunt, of the 24 of January 1679, and the 6 of November 1683, anent the payment of the Secretaries Dues, where Warrands are granted for discussing Reasons of Suspension or Advocation upon the Bill; And to the effect these Acts may be made effectual, they ordain the Secretaries Dues to be payed to the Clerk of the Bills, or his Deputes, within Twenty Four Hours after the Warrand for discussing shall be given in to him by the Clerk, who wrote the Warrand; Together with Four Shilling Scots, as the Dues of the Keeper of the Books of Enrolment, upon his Receipt thereof. And if the same be not done, Ordains the Bill for discussing to be cancelled. And for that effect, ordains the Bill of Suspension or Advocation, and any Bills bearing Deliverances, relating to the passing or discussing the Reasons on the Bill, to be returned to the Clerk of the Bills, by the Clerk who wrote the Warrand, immediatly after the same is granted by the Lords.

A C T, anent Warrands for Re-production of Processes.

November 11th. 1691.

The Lords of Council and Session considering, That where, upon Complaints of Parties, Warrands are granted by the Lords to Macers,

Macers, for apprehending of Advocats, or their Servants, who keep up Processes; The persons complained on, upon their Re-producing the Process, or Writs, conceave, they are not lyable to satisfy the Macer for his Pains, in apprehending them: Therefore, the Lords declare, that the Party Complainer is not lyable to pay the Macer for his pains; But that the Macer may detain the Party complained on, until he not only re-produce the Process, but also satisfy him for his pains, in executing the Lords Order.

Eodem Die.

A C T anent Bills of Suspension.

Cance, where a Bill of Suspension shall be given in, and that the Ordinary shall find Cause, to appoint the same to be seen and answered by the Charger, or otherways, shall sist Execution, that he order the Answers to be given in that Week, wherein he is Ordinary, unless the Bill of Suspension be given in on Friday, or Saturday; In which case, he shall appoint the Bill to be answered on Tuesday in the week following, and then the Bill is to be considered by the Ordinary for that ensuing Week. And where Bills of Suspension are given in, in time of Session, That the Orinary, in whose Week they are given in, shall determine, as to the passing, or refusing of the said Bill, without referring the same to the Ordinary for the next Week.

Eodem Die. A C T anent Writs produced for instructing Bills of Suspension.

The Lords of Council and Session do ordain the Act of Sederunt, of the Ninth of November 1680, concerning the Bills of Suspension to be duly observed, and particularly that part thereof relating to Bills of Suspension procured on production of Forged Writs, with this Addition, That where any principal Writs, Instruments of Nottars, or Coppies of Writs are given in with a Bill of Suspension, for instructing the Reasons thereof, That before up-giving of any principal Writs produced, the Ordinary, who passes the Bill, shall mark the Writs on the back thereof, to the cesses, that at discussing of the Suspension, the Writs may be reproduced

duced, otherways, that the Parties shall not be heard upon any of the Reafons: And in case they be not produced, large Expenses shall be Modisied to the Charger; beside the Protestation-Money. Because it is presumed, that the Writs were false, being made use of only for delay, it taking a considerable time, before the Suspension come to be discussed; And appoints the Clerk of the Bills to detain in his own hand, any Instruments of Nottars, and Copies of Writs produced, the same being likeways marked by the Ordinary who past the Bill, and allows him to give up the same, upon Receipt to be granted by the Charger, that they may be re-produced at discussing the Suspension.

ORDER for producing Copies of Interlocutors, with Petitions relating thereto.

November 13. 1691.

THE Lords of Council and Session considering, That Bills are frequently given in for altering Interlocutors, without shewing the Interlocutors themselves, and frequently Misrepresenting the same, or the State of the Process: Therefore the Lords declare, That they will admit of no Bills for altering any Interlocutor, or for altering the State of the Process, without producing with the said Bill the Process, or at least the Copy of the Last Interlocutor under the hands of the Clerks, or Servants, that wrote thereupon. Likeas, The Lords ordain the Clerks of the Outter-house, to give Copies of Interlocutors to the Parties, who shall demand the same, within 24 Hours after the same is signed by the Ordinary, as they will be answerable.

ACT concerning Advocats who enter upon Bill.

November 24. 1691.

THE Lords of Council and Session considering, That by an Act of Sederunt, of the Sixth of July 1688, the Form and manner of Trial, which has been observed these several years bygone, as to such who enter Advocats in the ordinary way, is ratisfied and approven, and a Method is therein set down for examining such Persons, who are admitted by the Lords extraordinary, upon a Bill to them. And the Lords being sensible, that A 2

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their allowing the extraordinary manner of Trial, in favours of Persons nearly related to any of their Number, may encourage their Relations to importune the Lords to procure their entry that way, and thereby give occasion to Misconstruction and Clamour: Therefore they declare, That in time coming, no person shall be admitted advocat, being Cousin-German, or of any nearer degree of Kindrid to any of the Lords ordinary, or extraordinary, unless he undergo the ordinary Trial mentioned in the foresaid Act of Sederunt, and this shall be extended to degrees of Affinity, as well as Consanguinity.

A C T concerning Oaths of Calumny.

January 13. 1692.

THe Lords of Council and Session considering, That Oaths of Calumny. as the same are some times proposed, and given by Parties in thir Terms, Viz. If the Parties has Reason to alledge, or deny the Points, whereupon he is required to depone, are ambiguous: And seing all Oaths should be in Terms distinct and clear: Therefore the Lords do ordain Oaths of Calumny to be in these Terms, That in case any Party require an Oath of Calumny upon any Allegiance proponed, and found Relevant for him. That he may require the Party, against whom the same is to be Proven, to depone, when ther he does not know the same to be true; So that he should put the Proponer to the necessity to prove the same; And if the Party, against whom any Point or Allegiance is to be proven, require the Oath of Calumny of the Party proponing the same, the Terms shall be, That he may enquire, Whether he knows the thing that he proposes, is not true; So that it were Calumnious for him to infift therein. And the Lords declare, That a Party is not holden to give an Oath of Calumny, in facto proprio & recenti: Seeing, upon the Matter, the same resolves in an Oath of Verity.

A C T for regulating the Order of Informations and Petitions.

February 6. 1692.

The Lords of Council and Session considering the many inconveniencies arising from the large and unnecessary Congestion of Narrations, and Matters of Fact, in Informations and Bills, spending a great part

part of the Leidges time unprofitably, in reading thereof: In which, frequently there is no mention made of what is instructed, or to be proven. And the far greatest part hath no occasion to be known, whether true or false; whereby the Lords cannot give distinct interlocutors to the points proposed: For remeid whereof, The Lords do declare, That they will take no Notice of, nor give any Answer to Matters of Fact in Bills and Informations, except to fuch as shall be distinctly proposed, as either instructed by particular Writs produced, and the Articles thereof marked on the Margine, and fo related, or which bear, That the Alledgers offers to prove their Allegiances, which they propose to be proven. And that, in either Case, they set down the said Allegiances, instructed, or to be proven, in larger Characters, that they may receive distinct Answers: And that every Allegiance bear the point, for, or against, which they are proposed. Likeas, The Lords prohibit any thing to be insert in the Informations, but in relation to the points contained in the Minuts of Dispute; And that the Informations keep the same Order in the Answers to Allegiances, in which the Allegiances are set down in the Minuts.

A C T concerning the Inventaring of the Writs of Defunct Persons.

February 23. 1692.

THe Lords of Council and Session considering, That by the Second Act 3. Sef. 2. Par. of K. Ch. 2. Inventars are appointed to be made of the Evidents, Means, and Estate of Pupils and Minors, Idiots, and surious Persons, before their Tutors and Curators meddle with their Writs, Means and Estate, in manner contained in the said Act: And that, for preventing the prejudice and inconveniency befalling to Pupils, and others who cannot provide for, nor defend themselves, if any person have access to their Charter-Chist, Writs, and Evidents of their Lands, Sums of Money, and others, belonging to them, which they may Imbazel, or suppress. And that a Charge cannot be made up against their Tutors and Curators, but that they must make both their Charge and Discharge. And the faids Lords confidering, That this execellent Statute cannot attain its due effect, except the Keyes of fuch Lock fast places, where their Writs, Evidents, Money, and other precious Moveables are contained, be fealled up, so soon as their Dying Predecessors become Moribundi, and uncapable

capable of Sense: Do therefore ordain the nearest Relations on the Fathers fide & the Mothers fide, or either of them, who shall be present at that time. to fee that the faids places be locked, and the Keyes fealed, under the feal of one or moe of them; and that being so sealed, the same be delivered to the next Judge Ordinary, until the Friends upon the Fathers fide and Mothers side be Advertised, to the effect they may enquire, if there be any Nomination of Tutors made by the Defunct, not inclosed in the faids Lock fast places: And if none be so found, That the nearest Friends, on Father side and Mother side, conform to the said Act of Parliament. shall take Inspection, until they find, if there be a Nomination: And that they proceed no further, nor take no further Inspection, but for finding the same; But that all be closed up, and the Keyes sealed by them, and that Intimation be made to the Tutors Nominat, that they may proceed to the making Inventars, conform to the faid Act: And that, if the Defunct's appearand Heir be no Pupil, but Minor, that the Keyes be sealed up, as aforesaid, and nothing opened, until the Minor, or some Authorised by him, be present. It is always hereby declared. That in case of Necessity, the Relict, or Children of the Defunct, at the fight of the Judge Ordinary, or two Justices of Peace, may take out so much of the Moneys, lying by the Defunct, upon their Receipt, as may defray the Expenses of the Burial. And where a person Dies, not within his own Honse, The Lords ordains, That the Master, or Mistress of the House, shall seal up his Keyes, and any Moneys, Writs, or Moveables in the Defuncts Possession, until the nearest Relation be acquainted: And in case the Keyes of any Lock-fast places, where the Defuncts Writs. Moneys, or precious Moveables are, be in the hands of his Wife, or any other person of the Family, that they give up the same to be sealed, as aforesaid. And it is hereby declared, That, if the persons related to the Defunct, being prefent at his Death, or the Master and Mistress of the House where he Dies, shall neglect to seal up the Keyes, as aforesaid: They shall be Holden and Repute as Imbazellers, or abstracters of their Writs, Evidents, Money, or precious Moveables, conform to the faid Statute: And the saids Lords do grant Warrand to Macers, to go to the Mercat Cross of Edinburgh, and there, with sound of Trumper, to publish this Act; and ordains the same to be Printed, that it may come to the Knowledge of the Leidges. ACT

ACT anent Processes of Sale of Bankrupts Lands.

February 24. 1692.

THE Lords of Council and Session considering, That the Processes for Sale of Bankrupts Estates, are now, by the 20th. Act of the 2d. Session of this current Parliament, appointed to be by way of Adjudication; and that the same requires more speedy dispatch than any other Adjudications, which pass summarly, unless the Debitor appear, and have just Defences: And seeing Bankrupts do ordinarly imbazel their Estates, uplift their Rents, destroy their Planting, Policy, and Houses, until the Sale be Expede: Therefore the Lords do ordain Processes of Sale of Bankrupts Estates, to have summar Dispatch, as other Adjudications, and that albeit they be taken up, seen and returned; Terms shall be appointed for proving the Rate and Rental of the Lands: But if the Defender appear, and alledge, That he is not Bankrupt, and that the same is not Nottour, that the Pursuer shall be obliged to prove, that the Debts, for which there are Adjudications, Apprisings, and other real Burdens on his Estate, exceed the Value thereof; and that the same Term be affigned for proving the Rental: And if any other Creditor appear, and produce a real Right, he shall be admitted to concur for proving the Rental, and Rate of the Lands, that there be no Collusion: which thall not hinder summar Process, as afcresaid.

ACT anent Persons going to Kirk and Mercat.

February 29. 1692.

THE Lords of Council and Session taking into their serious consideration, That the excellent Law of Death-bed, securing Mens Inheritances from being Alienat at that time, may happen to be srustrat and evacuat, if their coming to Church or Mercat be not done in such a solemn manner, as may give some Evidence of their Convalescence, without Supportation, or straining of Nature. And seeing some may think it sufficient, if Parties, after Subscribing such Dispositions, come to the Church at any time, and make a turn or two therein, though there were no Congregation at the time. And likewise, if they make any

Merchandise privily in a Shop, or Craim, or come to the Mercat place, when there is no publick Mercat; and all this performed before their own pick't out Witnesses, brought along by the Party, in whose favours the Disposition is made, that the Estate and Condition of his Health, or Sickness. may be as little under the View and Consideration of other indifferent persons, as can be. The occasion of which mistake might have been, That formerly there were publick Prayers, Evening and Morning in the Church in many places; to which these, who apprehend any Contraversy might arise upon the Validity of their Dispositions, were accustomed to come at the time of Prayer; and some thought, that they might come to the Church, though there were no publick meeting thereat, fince these publick Prayers were not accustomed, and to take instruments of their appearing there. For remeid whereof, the Lords declare, they will not sustain any such Parties going to Church and Mercat, where it is proven, that he was Sick before his Subscribing of the Disposition quarrelled, as done in lecto, unless it be performed in the daytime; and when People are gathered together in the Church or Churchyard, for any publick meeting, Civil or Ecclefiaftick; or when People are gathered together in publick Mercat. And further declares, That when foever Instruments are taken for the end foresaid, That the said Instrument do expresly bear, That it was taken in the Audience and View of the People gathered together, as aforesaid: Otherways, the Lords will have no regard to the said Instrument. And ordains these Presents to be instantly Printed, that it may come to the knowledge of all the Leidges, and none may pretend Ignorance in time coming.

ACT concerning the Examination of Advocats, upon the Law and Practique of this Kingdom.

June 25. 1692.

That they have been importuned of late, by frequent Applications of persons, craving to be admitted Advocats, without undergoing the ordinary Trial, both in our Law, and the Civil Law, observed these many Years bygone, and approven by Acts of Sederunt: And it being expedient to prevent the inconveniencies that may ensue upon the granting of such Petitions to persons unqualified, altho, on the other part, it were not reasonable to exclude persons who have sufficient skill in the Muni-

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Municipal Law of the Kingdom, because they have not studied the Roman Civil Law: Therefore the Lords declare, That, in time coming, they will not dispense with the ordinary way of Tryal of Advocats, unless they be first well informed of the Persons Integrity, good Breeding, honest Deportment, and Fitness for Exercing the Office of an Advocat, and that he has attended the House a considerable time, for Qualifying himself in order thereto: And thereupon, they will remit him to the Dean of Faculty, with a Certificat of his Consignation of the Dues, accustomed to be payed at the Entry of such Advocats, before they be admitted. And that Importunity may not prevail, upon Pretence of Relation to the Lords, it is hereby declared, That no Person is to have the benefit of this Act, who is Cousin-German, or of nearer Degree, to any of the Lords Ordinary, or Extraordinary: And that this be extended to Degrees of Affinity, as well as of Consanguinity.

A C T Concerning the Minut Books of Registers of Seasins and Inhibitions.

July, 15. 1691.

He Lords of Council and Session considering. That the many good Acts appointing Registers of Seasins, Reversions, Hornings, Inhibitions, &c. which were designed for the Security of the Rights of Lands. and that Purchasers might know, from whom to acquire safely, that Design hath been much frustrated, because these Writs could not be insert in the Register, for a considerable time after the days appointed for Regi-Aration thereof: So that, by Inspection of the Registers, Purchasers could not be certiorat of their Hazard. For Remeid whereof, it is statute by the thirty two Article of the Act of Parliament for Regulation of Iudicatures. That the Keepers of every Register should keep a Minut Book of all Writs delivered to them to be registrat, which was to be collationed with the Register, by the Sheriff and Baillies in the respective Jurisdictions, and two Justices of Peace, from time to time, as is at more length contained in the faid Act. Which being neglected, there can be no Security, by which Minut Books, which may be transcribed and altered at the Keepers Pleasure: And that the said Collationing was to be but Quarterly, that tho it had been observed, all were uncertain during that time. And the Lords finding an easy and plain

plain way of making up the faid Minut Books, that there can be no fear of any Alteration of them, if the Keepers of the faids Registers, immediarly after they receive the faids Evidents to be registrat, shall insert the Minut thereof in the Books, which shall be signed by the several Presenters thereof: Therefore the faids Lords do ordain all the Keepers of the Registers of Seasins, Reversions, Hornings, Inhibitions, &c. To make up their Minut Books in manner foresaid, after the days following, viz. The Keepers of the General Register of Seasins, Hornings and Inhibitions, and of the particular Registers of Seasins, Hornings and Inhibitions, keeped at Edinburgh; from and after the first day of August next; And the Keepers of the particular Registers in the rest of the Shires of the Kingdom, from and after the first day of September next, under the Pain of Deprivation, beside the Damnage they may be lyable in to the Parties prejudged, by their not making their Minut Books in manner foresaid. conform to the faid Act of Regulation. And the faids Lords do prohibit and discharge any blanks to be left in the saids Minut Books, and ordains these Presents to be Printed, and to be published by Macers at the Mercat Cross of Edinburgh, that none may pretend Ignorance.

ACT anent Acts where there is Competition of Rights.

Eodem Die.

The Lords of Council and Session considering, that in Processes, wherein there occurs Competition of Rights, Acts of late have been extracted, ordaining Parties to Depone upon the Quantities, at consect de debito, reserving the Parties competing their Interests to be discussed at the Advising of the Cause. And seing that Practice is inconsistent with the Form of Process, whereby the Relevancy ought to be discussed before Probation be led, and that the same does obstruct the Dispatch of concluded Causes; Therefore the Lords ordain, That, in time coming; the Rights of the Parties competing be first discussed, before Depositions be taken upon the Quantities: And as to any Acts already pass, bearing the Reservation toresaid, the Lords discharge them to come in as concluded Causes, but remits to the Ordinary, who pronunced the Act, to hear the Parties competing upon their respective Interests, and to determine the same.

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A C T discharging Oaths to be given in Writ.

Eodem Die.

The Lords of Council and Session considering the Inconveniency enfuing from the allowing Parties to give in Oaths in Writ, seing they may be thereby prompted how to Depone; Therefore the Lords declare, That, in time coming, they will receive no written Oaths, but that Parties shall be holden to Depone upon the Points of the Act, and such Interrogators relating thereto, as the said Ordinary shall find pertinent.

A C T concerning Suspensions and Advocations.

November, 30. 1692.

THe Lords of Council and Session having taken to their Consideration a Petition presented to them, in Name and behalf of the Lords Secretaries of State, representing, That their former Acts of Sederunt, appointing the Secretaries Dues of Suspensions and Advocations to be payed, where Warrands were granted for discussing the Reasons upon the Bills, had been altogether ineffectual: And als representing. That, by Collusion of Advocats Servants, and other Agents, who manage Processes for Parties, the Signet had been almost defrauded of the benefit of Extracts of Suspensions and Advocations, and the Liedges were also very much extorsed, these Advocats Servants, and other Agents. procuring Copies of Suspension and Advocation to be holden as principals, and charging the Clients with exorbitant Rates of fuch Extracts of Letters of Suspension and Advocation, (far exceeding what would have been demanded at the Signet) which they share amongst themselves. though no such Extracts were ever taken out. And also, that there hath been a late Practice of the Clerks of the Bill Chamber, and Under Clerks of Session, of receiving of Summonds of Reduction, though not expede under the Signet, whereby the Signet was defrauded of what was payable for such Summonds; For Remeid whereof, the Lords enact and declare, That, in time coming, whoever shall desire a Warrand for discuffing of Reasons of Suspention, or Advocation upon their Bills, shall be obliged to give in to the Lords, with their Petition, a Receipt under

the Hand of the Keeper of the Signet of the Secretaries Dues of the Sufpension or Advocation, which they defire to be discussed upon the Bill, without which, the Clerks are not to present the same to the Lords, and no Warrand for discussing shall be granted: And ordain all such Warrands, to be granted hereafter, to bear, That a Receipt of the Secretaries dues was produced, otherways, and in case of not payment of the faids Dues, to be void and null. Likeas, they prohibit and discharge the Clerks to the Bills, and their Deputs and Servants, to receive in, with Bills of Sufpension, any Summonds of Reduction Unsignet, and the Clerks of Session, and their Deputs and Servants, to receive any fuch Summonds of Reduction Unfignet into Processes. And to the effect, the Liedges may have an Ease in the Rates of Extracts of Suspension and Advocation off the Signet in time coming, and may not be extorfed by the exorbitant Accompts of Advocats Servants, and other Agents, upon account of Extracts of Suspension or Advocation off the Signet, which used to amount to two or three Dollars Charge, and that the Liedges may not be delayed, through want of the faids Extracts, it being in the Chargers Option, to hold a Copy for a principal, or not, at their pleasure: And likeways, to the effect the Signet may not be defrauded of a reasonable Consideration for the Extracts of such Letters, they enact and ordain, That, in time coming, no more be exacted at the Signet, for an Extract of Letters of Suspension, or Advocation, but the Sum of fifty eight Shilling Scots, and that Extracts be, without delay, expede the Signet to all such, who shall require the same, upon payment of the faid Rate. And in Confideration, That the faid Extracts are to be afforded the Liedges at the foresaid easie and reasonable Rate. and are also to be expeded, so as the Liedges be not delayed, they prohibit and discharge the holding of Copies, or attested Doubles of Suspensions or Advocations, in any Case, for Principals, and the Clerks of the Session, and their Deputs and Servants, to minut, that Copies are holden for Principals, or to extract any Act or Decreet in the Cause of Suspensions or Advocations, but where the principal Letters, or Extracts thereof, off the Signet, are extant in Process: As also, the Keeper of the Minut Book, to fustain any Copy, or attested Double, for a Principal, as they will be answerable for the Damnage sustained by the Signet, and to the Lords, for the Contravention of this Statute. to the Lords, with their their

ACT concerning Tutors and Curators, who do not make Inventars of their Pupils or Minors Estates.

February, 25. 1693.

THe Lords of Council and Session considering, That by the second Act, third Seffon, 2d. Parl. King Charles the 2d. Concerning Pupils and Minors their Tutors and Curators, Inventars are appointed to be made of Pupils and Minors their Estates, in manner therein-prescribed. wherein it is declared, That if the saids Tutors and Curators shall failzie, in making the faids Inventars, they shall be lyable both for Intromission and Omission, and shall have no Allowance or Defalcation of the Charges and Expenses waired out by them in the Affairs of the saids Pupils and Minors, Idiots and Furious Persons: But because the Meaning and Import of the said Clause has hitherto been doubtful, whether the same did exclude them from necessary and profitable Expenses, and what Affairs of the Pupils are thereby understood, and thereby there hath been different Interlocutors in different Circumstances; And it being necessary, that Tutors and Curators should be certified of the meaning and Extent of the faid Clause, therefore the Lords do declare. that as to all Expenses to be waired out by Tutors and Curators, in time coming, on their Pupils Affairs, who have not made Inventars conform to the faid Act, that they will allow no Expenses, though necessar's ly and profitably waired out upon Pursuits, or legal Diligences, but that the same doth not extend to the Expenses waired out upon the Entertainment of Pupils and Minors, or upon their Houses and Estates. And the saids Lords do ordain this Act to be published at the Mercar Cross of Edinburgh, and to be Printed.

ACT anent preparing Concluded Causes.

November, 1. 1693.

He Lords of Council and Session considering the seventeenth Ast of the fourth Session of Their Majesties first Parliament current, anent the way and manner of Advising Concluded Causes, ordains, That, in all time coming, the Ordinary Lords shall weekly, per vices, mean

meet in the Parliament House on Tuesday, Thursday and Friday, in the Asternoon, from three aclock till five at Night, for hearing of Parties on concluded Causes, conform to the Order thereof, and make Report, in Writing, of the Probation, and mark the particular Points of the Oaths or Writs insisted on for either Party, to the effect, the same being prepared, they may, in the Terms of the said Act of Parliament, Advise the same: And nominats and appoints the Lord Crossig to be Auditor, to the effect foresaid, for this Week, and each one of the Lords weekly thereaster, conform to the Order of their Commission.

ACT concerning the new Involment of Causes delet. November, 8. 1695.

He Lords, for preventing the Inconveniencies of double inrolling. prohibits the Keepers of the Rolls, both of Inner and Outter House, to incoll any Cause in any Weeks Roll, but once; And appoints the faid Keepers of the Rolls, to mark the first incolment upon the Back of the Process, for his greater Security: And they declare, That the scoring out of any Cause out of a Roll, shall have the same effect, as they were scored out of all other Weeks Rolls. And for the preventing thereof in time coming, they appoint the Lord President, Lords Ordinary for the Outter House, and for concluded Causes, to give in a List on the Saturnday of their Weeks, or the Munday thereafter, of all the Causes scored out and delet by them, to be recorded by the Clerks in Course, in a particular Book, for that effect, to ly before the Lords; inhibiting strictly the Keepers of the Rolls of the Inner and Outter House, to inroll the saids Causes so scored out de novo, except in Course, as they shall be given up, and that after all the Causes that were inrolled, before the fame shall be presented: And that it shall be competent to the Defender, or any other of the Liedges, to object against any Process otherways inrolled.

ORDER of the Lords, concerning Dispensations to be granted to inferior Courts, for sitting in time of Vacance.

July, 21. 1696.

The which day, the Lords taking to their Confideration, how long Dispensations should be granted to inferior Courts in the Vacance time, they discharge the Clerks to the Bills, to write upon Bills for granting

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of August next, for the Harvest Vacance, and beyond the twenty day of March, and this to be the Rule in time coming.

ORDER in favours of the Keeper of the Rolls for the Inner-House, for his Dues, concerning Causes summarly called there, and for affixing a Roll of such Causes.

July, 23. 1696.

The which day, the Lords did order and appoint, That all Causes coming in to be called in presence summarly, without abiding the Course of the Roll, do pay the ordinary Dues to the Keeper of the Inner House Rolls, for inrolling the same, before they can be called, as in the Case of Adjudications and Bills of Suspension in the Outter House, which pay the ordinary Dues of inrolling there. And appoints a Roll of such summar Causes, as are to be called, to be affixt on the Wall every Week.]

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granting any Dispensations to inferior Courts, beyond the twenty day of Argust next, for the Harvest Vacance, and beyond the twenty day of March, end this to be the Rule in time coming.

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July, 23. 2696.

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